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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

NEW JERSEY-PHILADELPHIA PRESBYTERY
OF THE BIBLE PRESBYTERIAN CHURCH, *et al.*,
Petitioners

v.

NEW JERSEY STATE BOARD OF
HIGHER EDUCATION, *et al.*,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5774

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH; SHELTON COLLEGE, A Ministry of Bible Presbyterian Church; BIBLE PRESBYTERIAN CHURCH OF COLLINGSWOOD, NEW JERSEY; Kevin WILSON, Brad GSEL, Kevin Clair MICHAEL, Curtis Jordan BASHAW, Louise OLSON and Everette Charles OLSON,

Appellants

v.

NEW JERSEY STATE BOARD OF HIGHER EDUCATION; T. Edward HOLLANDER, Chancellor of New Jersey Department of Higher Education; Richard D. BRESLIN, Assistant Chancellor for Academic Affairs of the New Jersey Department of Higher Education; and Amorita SUAREZ, Director of the Office for Independent College and Universities of the New Jersey Department of Higher Education.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Civ. No. 79-3341)

Argued June 22, 1984

Before: ALDISERT, *Chief Judge*, HIGGINBOTHAM, *Circuit Judge*, and HUYETT, *District Judge*.*

(Filed July 17, 1984)

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* Honorable Daniel H. Huyett, 3rd, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

PER CURIAM.

This is an appeal by Shelton College (a religious institution located in New Jersey), church entities affiliated with Shelton College, Shelton College students and parents, and a Shelton College faculty member from an order of the district court refusing to permanently enjoin the New Jersey State Board of Higher Education from enforcing against Shelton College two provisions of New Jersey's education law, N.J.S.A. 18A:68-3 and N.J.S.A. 18A:68-6, that require institutions of higher education in New Jersey to be licensed by the state before they can confer baccalaureate degrees. The district court held that application of New Jersey's degree licensing statutes to a sectarian college whose religious doctrine precludes state licensure does not violate the first amendment. We affirm.

This controversy between Shelton College and the New Jersey State Board of Higher Education has spawned almost two decades of litigation in the state and federal courts. In 1966, in response to a resolution by the New Jersey State Board of Education to terminate Shelton College's power to confer baccalaureate degrees because of its failure to comply with certain minimum educational standards, Shelton College brought suit against the Board in New Jersey state court, contending that New Jersey's degree licensing statutes infringed its freedom of speech in violation of the first amendment. The New Jersey Supreme Court certified an appeal and upheld the constitutionality of the statutes, thereby prompting the Board to revoke Shelton College's license to award degrees in New Jersey. *Shelton College v. State Board of Education*, 48 N.J. 501, 226 A.2d 612 (1967). In February 1979, the Board learned that Shelton College intended to offer courses in New Jersey and to grant degrees through its licensed Florida affiliate. Believing that this practice violated New Jersey's education laws,

the Board brought suit against Shelton College in New Jersey Superior Court to enjoin the college from engaging in any educational instruction or granting degrees until it obtained a New Jersey license. The Superior Court granted a preliminary injunction to that effect.

In November 1979, Shelton College joined with certain "federal only" plaintiffs, appellants herein, and filed an action under 42 U.S.C. §1983 in the United States District Court for the District of New Jersey seeking to enjoin the Board from interfering with their right to teach, advertise, and grant degrees without a New Jersey license. The district court issued a preliminary injunction, enjoining the Board, on first amendment religion grounds, from preventing Shelton College from engaging in religious teaching or educational activities or from advertising those activities. It retained jurisdiction of plaintiffs' claim that the degree licensing statutes violated the religion clauses of the first amendment pending construction of the statutes by the New Jersey state courts. *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 482 F.Supp. 968 (D.N.J. 1980). This court affirmed. *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868 (3d Cir. 1981).

Meanwhile, in the separate state court action, the New Jersey Superior Court held that New Jersey's degree licensing statutes were constitutional under the first amendment religion clauses, and it permanently enjoined Shelton College from awarding degrees until it obtained a license. Shelton College and the "federal only" plaintiffs then returned to federal district court seeking to preliminarily enjoin the Board from implementing that state court injunctive order pending review by the New Jersey Supreme Court. The district court granted a preliminary injunction. *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 514 F.Supp.

506 (D.N.J. 1981). The New Jersey Supreme Court affirmed the Superior Court, holding that New Jersey's degree licensing statutes applied to religious institutions and that they were not unconstitutional under the religion clauses of the first amendment. *New Jersey State Board of Higher Education v. Board of Directors of Shelton College*, 90 N.J. 470, 448 A.2d 988 (1982). Based on that decision, the district court below refused to make permanent its preliminary injunction enjoining the Board from enforcing New Jersey's degree licensing statutes against Shelton College. Plaintiffs appealed.

Before us, appellants contend that the application to Shelton College of New Jersey's degree licensing statutes infringes upon their free exercise of religion and creates an excessive state entanglement with religion in violation of the religion clauses of the first amendment. Appellees respond that because these constitutional issues were fully litigated in the New Jersey Supreme Court, resulting in a final judgment prohibiting Shelton College from conferring baccalaureate degrees without a license, appellants are barred on res judicata grounds from relitigating the issues in federal court. Alternatively, appellees argue that New Jersey's degree licensing statutes are constitutional under the first amendment.

After due consideration of these contentions, and for the reasons set forth in the district court opinion by the Honorable Dickinson R. Debevoise, *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, Civ. No. 79-3341 (D.N.J. July 29, 1983), *reprinted in* app. at 225, we conclude that this action is not barred on res judicata grounds and that New Jersey's degree licensing statutes pass constitutional muster.

Accordingly, the judgment of the district court will be affirmed.

TO THE CLERK:
Please file the foregoing opinion.

Circuit Judge

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH; SHELTON COLLEGE, etc., et al., *Plaintiffs*,	:	Civil No. 79-3341
v.	:	Transcript of Proceedings
NEW JERSEY STATE BOARD OF HIGHER EDUCATION, etc., et al., *Defendants*.	:	Newark, New Jersey July 29, 1983

BEFORE:

HONORABLE DICKINSON R. DEBEVOISE, U.S.D.J.

Appearances:

(No appearances.)

THE COURT: What I intend to do is simply put an opinion on the record and then reserve the right to take the transcript of the opinion and correct it as needed.

The procedural history of this case first in this court as reported in 482 F.Supp. 968 (1980) (*Shelton* I), then in the Court of Appeals, reported in 654 F.2d 868 (1981) (*Shelton* II), and then in this court again is described in *New Jersey-Philadelphia Presbytery v. N.J.*, 514 F.Supp. 506, (D.N.J. 1981), (*Shelton* III). In *Shelton* III I set forth reasons why the defendants should be preliminarily enjoined from enforcing or implementing an order of

the Chancery Division of the New Jersey Superior Court in the related state court action enforcing the application of the New Jersey licensing statutes and regulations against Shelton College until such time as the Supreme Court of New Jersey construed the statute and regulations.

The New Jersey Supreme Court directly certified the case then pending in the State Superior Court. It held that "the State's program for licensing institutions of higher education is applicable to sectarian institutions and that facially it does not unduly interfere with the free exercise of religion nor create an excessive state entanglement with religion." (*N.J. Bd. of Higher Ed. v. Shelton College*, 90 N.J. 470, 490 (1982)). The Court, however, modified the judgment of the Chancery Division to allow the awarding of earned credits and degrees to all eligible students through the end of the 1982-83 academic year, and to the class of 1984 through the end of the 1983-84 academic year.

On January 10, 1983 a plenary trial of the instant case was held. The State court trial testimony and exhibits were made part of the record and each side called one additional witness. I reserved decision giving the parties additional time to submit post trial briefs. I have reviewed the entire record, the briefs, and conclude that plaintiffs are not entitled to further relief.

The preliminary injunction entered in this case after *Shelton* I need not be made final because the state courts have ruled that the New Jersey licensing statutes and regulations do not and were not intended to prevent Shelton College from teaching or advertising. They do no more than regulate the granting of formal degrees.

The remaining issues are whether the New Jersey degree licensing statutes and regulatory scheme violate plaintiffs' First Amendment right to free exercise of their religion, and whether the licensing system results in an impermissible entanglement between government and religious institutions. I conclude that in the peculiar

circumstances of this case the decision of the New Jersey Supreme Court on these issues is not res judicata and binding upon the plaintiffs other than, perhaps, Shelton College. I further conclude, however, that the New Jersey statutes and regulatory scheme as explicated by the New Jersey Supreme Court, pass Constitutional muster.

Res Judicata Issue

In order to evaluate the defendants' res judicata claim, it is necessary to review certain of the procedural steps in the case.

Before this case was instituted, the New Jersey State Board of Higher Education had instituted an action in the Chancery Division of the New Jersey Superior Court to restrain Shelton College from operating without a license. The defendants in that case were the board of directors of Shelton College and two of its officers. On the date the complaint was filed, the Superior Court issued a temporary restraining order enjoining, with a limited exception for certain students for a short period of time, all educational or instructional activities and advertising.

Shortly afterwards plaintiffs filed this action under 42 U.S.C., Section 1983, alleging that the efforts of the Board to prevent Shelton's educational and instructional activities unless it complied with New Jersey's licensing scheme violated their rights to the free exercise of religion and unduly entangled the State in the affairs of a religious institution.

Plaintiffs in the federal action were Shelton College, New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church, the Bible Presbyterian Church of Collingswood, four Shelton College students, two parents of Shelton College students, and a member of the Shelton College faculty.

After an evidentiary hearing in the case I entered an order which, among other things, enjoined the defendants from taking or permitting the taking of any action having the effect of preventing Shelton College from engaging in any religious teaching or educational activities or from publicizing such activities. I did not reach the principal issue, namely, whether the Board's licensing procedures, if applicable to Shelton College, would constitute a violation of the religion clauses of the First Amendment. I abstained as to that issue and stayed the federal proceedings until the State court had an opportunity to determine whether the licensing requirements applied to a religious institution such as Shelton College. If they did not, there would have been no need to reach the difficult constitutional issue posed in this case. Railroad Comm'n against Pullman Co., 312 U.S. 496 (1941).

The defendants argue on the basis of *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny, that the federal case should have been dismissed since there was a pending state court proceeding started before this action involving a matter of important state interest. I stated in *Shelton* I that "if one were to accept the State Board's contention that all that is involved in this case is a question whether the State Board has the power to license Shelton and grant degrees and if there were no attempt to shut down this teaching institution, it is my opinion that both the *Younger* and the *Pullman* doctrines would be applicable." 482 F.Supp. at 976.

However, at that juncture in the state and federal litigation the State Board was not simply seeking to deny Shelton College the right to grant degrees. It sought to prevent it from engaging in any teaching activities, disrupting in the process the religious expression and practices of a community of believers. This, I concluded, was such an egregious violation of First Amendment rights that the case came under a recognized exception to the *Younger* doctrine. The *Younger* doctrine of abstention will not apply in extraordinary circumstances where

there will be great, immediate and irreparable harm if the federal court does not intervene. Further I concluded that in the situation of a *Pullman* abstention, the abstaining federal court should retain jurisdiction and may, while the state proceedings are being completed, grant such interim injunctive relief as may be necessary to insure the protection of federal rights.

Upon granting the preliminary injunction referred to above I abstained on both *Younger* and *Pullman* grounds pending completion of the State court action.

As a general rule, when a federal court concludes that it is required to abstain on *Younger* grounds, it will dismiss the complaint, requiring the parties to pursue their remedies and argue their federal claims in the state court proceeding. Occasionally, however, instead of dismissing the complaint in a *Younger* situation, the federal court will stay the federal proceeding, reserving jurisdiction to grant such relief as may be required upon completion of the state proceeding. *Williams v. Red Bank Bd. of Ed.*, 662 F. 2d 1008, (3d Cir. 1981).

Both sides appealed the order granting injunctive relief in part and denying such relief in part.

The Court of Appeals resolved the State's *Younger* abstention arguments on different grounds from those upon which I relied. The majority opinion did not find that "extraordinary circumstances" called for an exception to *Younger* abstention. Rather, it concluded that the *Younger* doctrine was simply inapplicable because there were parties in the federal action (churches, parents, students and a teacher) who were not parties to the State action and who had separate interests of their own.

". . . nonparties to the state enforcement proceedings who assert independent constitutional interests may advance those interests in a separate federal action. Since the interests of any of these plaintiffs alone are sufficient to justify the Court's consideration of the application for a preliminary injunction, that order cannot be reversed on the chief ground the Board advances,

absent a very great extension of the *Younger* rule . . ." *Shelton* II, 654 F.2d at 881.

Thus, to the extent that *Shelton* I ruled that the stay of proceedings after issuance of the preliminary injunction was based on *Younger* grounds, its reasoning must be considered to have been rejected by the majority opinion in *Shelton* II.

On the other hand, the Court of Appeals upheld the *Pullman* type stay with retention of jurisdiction to consider further relief when the State court had construed the statutes and regulations.

While the federal action was pending before the Court of Appeals, the State court action was tried and decided in the Chancery Division of the New Jersey Superior Court in June, 1980. At that trial Shelton College presented and argued its federal and constitutional claims. The State plaintiffs in that case had abandoned their original position that Shelton College could not teach or advertise without the imprimatur of a state license and simply sought a ruling that Shelton College could not grant degrees or call itself a college without such a license. The State trial court held that the institution was entitled to designate itself a college, but further held that the State licensing statutes precluded Shelton College from granting degrees in New Jersey without a license from the State Board of Higher Education and that such a requirement did not violate the United States Constitution.

After the decision in that case and after the decision of the Court of Appeals in *Shelton* II, but before the decision of the New Jersey Supreme Court, I issued the *Shelton* III opinion in which I enjoined the State Board of Higher Education from enforcing the order of the Superior Court until such time as the New Jersey Supreme Court definitively construed the applicable New Jersey statutes and regulations.

In August, 1982 the New Jersey Supreme Court definitively construed the statute and regulations in a

comprehensive opinion referred to above. The Court declined to follow the route that the United States Supreme Court followed in *NLRB v. Catholic Bishops of Chicago,* 440 U.S. 490 (1979). There the Court avoided the difficult question whether application of the National Labor Relations Act to lay teachers employed by parochial schools violated First Amendment religion clauses by holding that the Act did not apply to religious schools. The New Jersey Supreme Court, on the other hand, concluded the New Jersey Statute, NJSA 18A:68-3 and NJSA 18A:68-6, by their clear language and obvious intent applied to religious as well as secular colleges. Having so concluded, the Court turned to the constitutional question whether the application of the statutes to Shelton College unconstitutionally infringes upon plaintiffs' free exercise of their religion.

The Supreme Court assumed for the purposes of that case that plaintiffs' religious beliefs prohibited Shelton College from applying for and obtaining licensure by the New Jersey Board of Higher Education. That was a generous concession to the plaintiffs. The evidence clearly establishes in both the State case and in the federal case that in the past plaintiffs had no compunctions about applying for licensure in New Jersey and Florida. This assumed article of faith will be found neither in the Institutes of the Christian Religion nor in the Westminster Confession nor in the Larger Catechism nor in the Shorter Catechism. It derives from more recent inspiration.

The New Jersey Supreme Court nevertheless accepted plaintiffs' position in this regard and it recognized that the New Jersey licensing statutes as applied to Shelton College imposed some burdens on the exercise of religion. However, it found that the legislation supports strong State interests, namely, maintenance of the integrity of the baccalaureate degree in protecting students as potential consumers of higher education. It further found that granting a religious exemption from

licensing would significantly hinder attainment of these State interests and thus application of the statute to Shelton College does not constitute an abridgement of the Free Exercise Clause of the First Amendment.

The Supreme Court further concluded that the statutes have a secular purpose and their primary effect neither advances nor inhibits religion and thus avoids excessive entanglement with religion.

It is in the discussion of this issue that one discerns how far removed is the position of the New Jersey Supreme Court from the original position of the New Jersey State Board of Higher Education which precipitated the federal litigation.

The original position of the State Board, which was accepted in the first instance by the Superior Court, was that Shelton College, not having obtained a license, must be shut down in toto and prohibited from teaching secular or religious subjects and prevented from publicizing its existence and its teachings. The State Board in its administration of the licensing statutes exhibited total unawareness of First Amendment rights. It was this circumstance which necessitated federal court intervention. Were the statutes and regulations to be administered in the spirit originally manifested by the State Board, there is little doubt but that they would have had to have been declared unconstitutional in their application if not on their face.

Neither party in the present proceeding, however, has emphasized sufficiently the totally different approach to the statutes and regulations taken by the Supreme Court. The Court was fully aware of the delicate balance that must be struck between compelling state interests and the exercise of religious faith. Its opinion made it very clear that the licensing statutes, as they are applied to religious institutions, are to intrude as little as possible upon the functioning of such institutions. The pertinent paragraphs of the opinion can only be construed as a gentle but unmistakable directive to

the State Board to apply the statutes and regulations in a manner that will result in as little intrusion upon religious colleges as possible.

Quoting from the opinion: "The establishment clause permits minor unobtrusive State supervision of religiously oriented schools. Only excessive entanglement is proscribed. None of the education statutes or regulations here in question mandate active involvement of the sovereign in religious activity. None authorize the state regulation of the contents of an educational program, nor does the regulatory scheme on its face require comprehensive, discriminating and continuing state surveillance. Although the regulations in this area, NJAC 9:1-1 to 2.14 appear to be burdensome, especially as applied to a college of approximately 30 students, they explicitly call for flexibility of their administration so as to accommodate various institutions with diverse educational goals, NJAC Title IX, Forward.

"Because Shelton College declined even to complete the licensing process, the allegation of excessive entanglement rests on speculation of the manner in which those statutes and regulations might be applied. Although one could imagine an unconstitutional application of its regulatory scheme, we are confident the Board of Higher Education will pursue the least restrictive means to achieve the State's overriding concerns." 90 N.J. 488 to 490 (citations omitted).

On this basis the Court concluded that the statutes and regulations did not create excessive state entanglement with religion. Thus plaintiffs, by virtue of their litigation in the State and federal courts, have effected a very profound change in the manner in which the State Board will deal with religious colleges in the future.

It is the State's argument that both the statutory interpretation and constitutional holdings of the New Jersey Supreme Court are binding in the present federal action.

Generally the principles of res judicata are applicable in federal Section 1983 cases, that is, parties to the Section 1983 action will be bound by determinations against them on issues decided in the state court proceedings. *Allen v. McCurry,* 449 U.S. 90 (1980).

However, the Court of Appeals held in *Shelton* II that the federal abstention in this case to allow completion of the State court proceeding is not a *Younger* abstention, but rather properly a Pullman abstention.

In the case of such an abstention, the federal court stays its hand in order to give the state courts an opportunity to decide state law questions, the determination of which may make it unnecessary to reach the constitutional question. Thus in the present case had the New Jersey Supreme Court construed the licensing statutes to exclude religious colleges, it would have been unnecessary to have dealt with the constitutional issue.

In a Pullman *abstention* situation the federal plaintiffs are entitled to have their federal claims decided in a federal court once the state law claims are resolved in the state court. However, this right will be lost if a litigant unreservedly litigates his federal claims in the state court. If he does that the may not return to the federal court to relitigate his federal claim there. *England v. Louisiana Medical Examiners,* 375 U.S. 411 (1964).

In the present case Shelton College did litigate its federal claim in the state courts without reservation. Its belated effort in the New Jersey Supreme Court to reserve those claims for the federal court hardly suffice to overcome the *England* rule. Were the College the only plaintiff in the federal case, I believe it should be held to be bound by the New Jersey Supreme Court decision.

However, the College is not the only plaintiff in the federal action. For the same reasons that the Court of Appeals held in *Shelton* II that *Younger* principles were not applicable, I conclude that the principle of res judicata should not preclude the plaintiffs who appear only

in the federal action from seeking a ruling on their federal claims in this court.

First Amendment Religion Claim Issue

It is necessary, therefore, to determine whether the New Jersey licensing statutes, as construed by the New Jersey Supreme Court, violate plaintiffs' First Amendment religious rights.

The underlying facts are set forth in *Shelton* I, II and III. There can be no question that Shelton College is a religious institution in all phases of its activities. Plaintiffs, therefore, have stated a religious liberty claim, e.g., *United States v. Ballard*, 322 U.S. 78 (1944). It is quite likely that Shelton College will not be able to survive if it is unable to grant baccalaureate degrees. In the light of the New Jersey Supreme Court decision, however, it is not at all certain that Shelton College would be unable to obtain a license to grant such degrees if it applied for such a license. Unlike the New Jersey Supreme Court, I do not assume the members of the Bible Presbyterian Church and related fundamentalist religious groups are forbidden by their faith to permit their colleges to apply for state licensing. The evidence in this case is to the contrary. Therefore, the question is not whether Shelton College is being forced to do something its religious tenets forbid. The question is whether the statute and regulatory scheme involve an impermissible intrusion by the State into the affairs of a religious institution.

Given the generally undisputed facts in this case, it must be determined whether the impact of the State's statutes and regulations upon the religious interests of the plaintiffs can be justified by a compelling state interest in the regulation of a subject matter within the State's constitutional power to regulate. *Sherbert v. Verner*, 374 U.S. 398 (1963).

Plaintiffs urge that the conditions for licensure imposed by the New Jersey statutes and regulations would

impose impermissible burdens upon plaintiffs' religious liberties. I refer to these burdens at some length in *Shelton* III, 514 F. F.Supp., 512 to 513. Plaintiffs note that the requirements contained on the Standards for New Jersey Institutions of Higher Learning are not specific in nature. Rather, they are written in very general terms leaving broad discretion to the agency and persons administering the licensing program. This, plaintiffs argue, opens the way for total State regulation of Shelton College's religious ministry.

Defendants, on the other hand, urge that this very flexibility of the regulations makes it possible for the administrators of the licensing program to adapt the regulations and standards to particular circumstances of a religious institution.

The conclusion to be drawn is that whether this licensing program impinges on religious liberties will depend upon the manner in which the program is administered.

Were the original attitude of the State Board of Higher Education to guide the administration of the licensing program to prevail, one might well have cause for concern that Shelton College's religious mission would be impermissibly affected. However, the New Jersey Supreme Court opinion not only demonstrates complete awareness of the need to accommodate the administration of the statutes and regulations to the religious purposes of the College, it also constitutes a gentle but firm direction of the Board of Higher Education to pursue the State's concern with these religious considerations in mind. The Court noted that "Should the Board exercise its discretion in a manner that unnecessarily intrudes into Shelton's religious affairs, the college would then be free to challenge the constitutionality of such action." 90 N.J. at 490.

In light of the Supreme Court's opinion I think it is inconceivable that the State Board would seek to modify in any way any statement of purpose which Shelton

College sets forth in a license application or attempt to judge the appropriateness or lack of appropriateness of such purpose. Further, I think one would now expect the Board to make every effort to accommodate its requirements to the religious beliefs and practices of Shelton College and of its students, parents and teachers.

Much of the testimony and other evidence in the State and federal court proceedings related to the question of whether the State of New Jersey has a compelling State interest in regulating the granting of degrees. Plaintiffs urge that no such interest exists. They urge that the quality of a bachelor's degree or of any other degree is dependent upon the quality of the institution granting the degree, not upon State regulations. They noted the depreciation of the integrity of the degree, a factor to which I alluded in *Shelton* III, 514 F.Supp., 514.

However, even plaintiffs' witnesses attested to the importance of maintaining the quality of higher education and the degrees evidencing attainment of such education. It is a subject in which the State has a compelling interest. Even though the imposition of licensing requirements has not assured uniformly high quality education in all institutions of higher learning, the State is certainly justified in pursuing that goal.

The extent to which the attainment of this goal would be jeopardized by absolute exemption of religious colleges from any form of degree licensing requirements is illustrated by the case of *State ex rel McLemore v. Clarksville School of Theology*, 636 S.W. 2d 706, (Sup. Ct. of Tenn. 1982). The Clarksville School of Theology, a totally religious institution, had not complied with the requirements of the Tennessee Higher Education Commission promulgated pursuant to statutory authority. The Attorney General brought an action to enjoin the school from granting degrees until it met the requirements of the statute.

The evidence established that for a bachelor's degree an applicant must first have faith, second, be a pastor or evangelist, and third, must complete a "synthetic" Bible study and write a thesis of 30,000 words. A bachelor of theology degree cost $25 at enrollment, $320 tuition, and $30 for a cap and gown. Students were required to attend only three seminars, that being the only classroom attendance required. Without the granting of degrees, the students at the institution would not have attended.

The School defended the case on very much the same grounds that Shelton College advances here. The Tennessee Supreme Court held the granting of degrees is purely a secular activity, and that was the only activity the State sought to regulate, leaving the school free to believe, practice and teach as it thought fit. It found neither a burden upon the free exercise of religion nor a threat of entanglement between the affairs of church and state.

If the award of a degree is to have any significance whatsoever, criteria such as those established by Clarksville School of Theology cannot be permitted to serve as a basis for a degree.

Even more bizarre examples of degree criteria can be conjured up if religious institutions are totally exempted from all regulations of degree granting activities. I believe the State does have a compelling interest in preventing the impairment of minimum standards for the granting of degrees and protecting the gullible and the unwary.

True, the licensing process imposes some burden on a religious institution such as Shelton College which conducts its educational program in a manner which qualifies its students for a degree in the traditional sense. However, in light of the manner in which the New Jersey Supreme Court has directed that the statute and regulations be applied to a religious college, I conclude the burden is not undue.

Further, in light of the New Jersey Supreme Court's directions in this regard, it cannot be held that the statutes and regulations on their face involve an undue entanglement with religion within the principles of *Walz v. Tax Commission of New York*, 397 U.S. 664 (1969), and *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976). It is possible, of course, that the licensing scheme could in fact be administered in a manner which would intrude unduly upon religious matters, but it should not be assumed the State Board will disregard the directions of New Jersey's Supreme Court or that the Courts would fail to rectify the situation if it did.

CONCLUSION

This case has run a long course.

At the outset the New Jersey Board of Higher Education sought to enforce New Jersey's degree licensing statutes and regulations by shutting down Shelton College and preventing it from teaching and advertising. It had obtained a state court order to that effect.

In light of the Board's lack of awareness of fundamental constitutional rights evidenced by the sanctions it sought, it takes only a little imagination to predict the manner in which the Board would have applied the licensing statutes and regulation to Shelton College at that time. One could safely have predicted that the Board would have been unaware of the great care which would have been required to avoid impinging upon the religious liberties of the plaintiffs.

The plaintiffs prevailed at the outset in the federal action obtaining a preliminary injunction restraining the Board from shutting down the College and from limiting its rights to advertise its activities.

In several respects plaintiffs have prevailed in the State courts. Both the trial court and the Supreme Court recognized that on both statutory and constitutional grounds the State lacks the power to shut down Shelton

College or to limit in any way its teaching or religious activities. All the State has the power to do is to prohibit Shelton College from granting degrees unless it complies with the licensing program. Although the New Jersey Supreme Court held that the statutes and regulations apply to religious institutions, it made it abundantly clear that in administering the statutes and regulations the State Board must take into account and accommodate plaintiffs' religious beliefs and practices. Thus, one can confidently expect that the State Board's administration of the licensing program will reflect these directions.

In light of these developments the preliminary injunction issued in this court is no longer required and will be vacated.

In light of my conclusion that New Jersey may regulate the granting of degrees by religious colleges in a manner specified by the New Jersey Supreme Court, further relief in the federal action will be denied. Judgment will be entered for defendants without costs.

Notwithstanding the entry of judgment for defendants, plaintiffs are clearly the prevailing parties for the purposes of the Civil Rights Attorney's Fee Award Act, 42 U.S.C. Section 1988. They succeeded in obtaining relief on the merits in the form of a preliminary injunction preventing the State from closing Shelton College and ordering it to cease teaching and advertising. Following its obtainment of this relief, plaintiffs were able to persuade the State courts that the State did not have the power to close Shelton College even though is was unlicensed. Further, as a result of plaintiffs' actions, the New Jersey Supreme Court rendered an opinion which established the State Board of Higher Education obligation to administer the degree licensing statutes and regulations with due regard to the religious nature of Shelton College.

Therefore, if the parties cannot agree to an appropriate amount of attorneys' fees, plaintiffs should file an

updated application for fees, bearing in mind the principles set forth in *C. Duane Hensley v. Thomas Eckerhart*, 51 U.S. Law Week 4552, (U.S. Supreme Ct. 1983) and *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 689 F.2d 1161, (3rd Cir. 1982).

The defendants will be requested to submit a form of judgment consistent with this opinion.

All right. Thank you very much. That will resolve it.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH, SHELTON COLLEGE, et al.,	:	Civil No. 79-3341
Plaintiffs,	:	ORDER
v.	:	
NEW JERSEY STATE BOARD OF HIGHER EDUCATION, et al.,	:	
Defendants.	:	

Plenary trial of this matter having been held on January 10, 1983, and post-trial briefs having been submitted, and the court having considered all the evidence and legal arguments set forth by the parties, and it appearing for the reasons set forth in this court's bench opinion of July 29, 1983, that plaintiffs are not entitled to declaratory or injunctive relief beyond that awarded in this court's opinion and order of January 4, 1980,

IT IS on this 26th day of September 1983 ORDERED and ADJUDGED that no further relief being warranted in this action judgment shall be entered for the defendants and the complaint shall be dismissed with prejudice and without costs;

Further ORDERED and ADJUDGED that plaintiffs having prevailed on the merits at the preliminary injunction proceeding after which defendants abandoned certain of their original positions as to the meaning and effect of the New Jersey degree licensing statute, plaintiffs may make application to the court for an award of attorneys fees pursuant to 42 U.S.C. § 1988 after making a good faith effort to reach agreement with defendants as to an appropriate amount of such award.

DICKINSON R. DEBEVOISE
U.S.D.J.

APPENDIX C

SUPREME COURT OF NEW JERSEY
A-138 September Term 1981

THE NEW JERSEY STATE BOARD OF HIGHER EDUCATION and T. EDWARD HOLLANDER, CHANCELLOR OF THE NEW JERSEY DEPARTMENT OF HIGHER EDUCATION,

Plaintiffs-Respondents,

v.

THE BOARD OF DIRECTORS OF SHELTON COLLEGE, GLENN ROGERS and CARL McINTIRE,

Defendants-Appellants.

Aruged March 8, 1982 — Decided August 9, 1982

On certification to the Superior Court, Chancery Division.

William Bentley Ball, a member of the Pennsylvania bar, argued the cause for appellants (*Bashaw & Burro,* attorneys; *Mr. Ball, Philip J. Murren, Kathleen A. O'Malley* and *C. Clark Hodgson, Jr.,* members of the Pennsylvania bar, of counsel; *Keith J. Bashaw* and *C. Peter Burro,* on the brief).

Robert A. Fagella, Deputy Attorney General, argued the cause for respondents (*Irwin I. Kimmelman,* Attorney General of New Jersey, attorney; *Erminie L. Conley,* Assistant Attorney General, of counsel).

Michael F. Spicer submitted a brief on behalf of *amicus curiae* The Association of Independent Colleges and Universities of New Jersey (*Jamieson, McCardell, Moore, Peskin & Spicer,* attorneys; *Mr. Spicer* and *Laura C. Ford,* on the brief).

Garrett M. Heher submitted a brief on behalf of *amicus curiae* Council of County Colleges (*Smith, Stratton, Wise & Heher*, attorneys; *Mr. Heher* and *Thomas E. Kopil*, on the brief).

The opinion of the Court was delivered by O'HERN, J.

Two provisions of New Jersey's education law, *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6, prohibit the conferring of baccalaureate degrees by any institution that has not secured a license from the State Board of Higher Education. We hold that application of these statutes to a sectarian college whose religious doctrine precludes state licensure does not violate the First Amendment.

I.

Shelton College is an institution of higher education operated by the Bible Presbyterian Church as part of the church's religious mission. Members of this fundamentalist Christian church believe that every aspect of their lives, including education, must be governed by their faith. Shelton's teachers and students believe that their presence at the college is for the purpose of preparing themselves and others to undertake missions that their Lord calls upon them to perform. Religion pervades Shelton College. Every academic subject is taught from a Christian fundamentalist perspective and students must conform their behavior to religiously derived codes of conduct. Shelton College is a school of approximately 30 students, but those who attend it cherish its mission.

The procedural pilgrimage of Shelton College to this point of decision began after the school opened operations in New Jersey in the 1950's under a temporary license issued by the State. In 1965, the State Board of Education passed a resolution proposing to terminate Shelton's power to confer baccalaureate degrees because the college had failed to comply with certain minimum

requirements. Shelton appealed the Board's action, challenging the constitutionality of *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18:68-6, the statutes that regulate the award of baccalaureate degrees. *Shelton College v. State Bd. of Ed.*, 48 *N.J.* 501 (1967) (*Shelton I*). Specifically, Shelton asserted that (1) any state regulation of baccalaureate degrees abridges the right of free speech guaranteed by the New Jersey and Federal Constitutions; (2) the licensing statute effected an overbroad delegation of legislative power to an administrative agency, in violation of the New Jersey Constitution; and (3) the legislation deprived Shelton of equal protection of law because it contained limited exemptions for institutions that had the authority to confer academic degrees prior to 1887. *Id.*

The Court upheld the statutes against Shelton's constitutional attacks and affirmed the action of the State Board of Education. Central to the Court's decision was its discussion of the bachelor's degree and the State's interest in preserving the degree's integrity. Chief Justice Weintraub carefully traced the history of New Jersey legislation relating to the granting of baccalaureate degrees, and concluded that

> . . . it is the degree, evidential as it is of academic attainment, which especially is an approporiate object of regulation. . . . "The power to confer academic degrees is to be regarded as distinct and separate from the privilege of being incorporated as an educational institution. The privilege of granting degrees is very intimately related to the public welfare, and is unquestionably subject to regulation by the State."
>
> [*Shelton I, supra*, 48 *N.J.* at 511, quoting Elliott, *The Colleges and the Courts* (1936) p. 200].

Thus, *Shelton I* held that the State has a substantial interest in regulating the bachelor's degree and that it

may constitutionally prohibit the granting of such degrees by unlicensed institutions.

In 1971, after *Shelton I* and the conclusion of related litigation, *In Re Shelton College*, 109 *N.J. Super.* 488 (App. Div. 1970), the State Board of Higher Education revoked Shelton's temporary license to award degrees in New Jersey. Shelton College moved its operations to Florida where it obtained a license to confer bachelor's degrees in that state. It has continued to operate there up to the present time and, as late as May 1981, applied to Florida officials for renewal of its license.

In February of 1979, Shelton College submitted a new application to the New Jersey State Board of Higher Education, seeking authorization to award baccalaureate degrees in Biblical Literature, Christian Education, Elementary Education, Secondary Education, English, History, Business Management, Music Education and Natural Science. Before it secured such authorization, however, Shelton began to offer credit-bearing courses in New Jersey that it represented would lead to a bachelor's degree. On November 15, 1979, the State Board of Higher Education brought suit in the Superior Court, Chancery Division, alleging that Shelton's New Jersey operations violated *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6 which prohibit the conferring of degrees or the furnishing of instruction for the purpose of conferring degrees, except by licensed institutions. The State Board sought an injunction restraining Shelton from engaging in any form of educational instruction, offering any credits, or granting any degrees until it obtained a license authorizing it to do so. The Chancery Court granted a preliminary injunction to that effect.

On November 19, 1979, Shelton College and various students and faculty members instituted an action under 42 *U.S.C.* §1983 in the United States District Court for the District of New Jersey. The federal plaintiffs alleged that application of the New Jersey licensing statutes to Shelton College violated rights guaranteed them by the

First, Ninth and Fourteenth Amendments to the United States Constitution. They sought both declaratory and injunctive relief.

The District Court issued a preliminary injunction, enjoining the State from taking any action to prevent Shelton College from engaging in religious teaching or educational activities, or from publicizing or advertising these activities.[1] Although the court granted partial injunctive relief to the federal plaintiffs, it abstained from deciding whether the New Jersey licensing statutes apply to religious institutions, such as Shelton College. The District Court stayed the federal action to permit the state courts to resolve this issue.

In February 1980, the State Board appealed the District Court's order to the United States Court of Appeals for the Third Circuit, and the fededral plaintiffs cross-appealed. While the federal appeal was pending, the state court action proceeded to trial in June 1980. At this trial Shelton College presented its federal constitutional claims. The Superior Court upheld the constitutionality of the licensing statutes as applied to Shelton College and on December 10, 1980 entered a permanent injunction which, among other things, restrained the college from awarding course credits or degrees in New Jersey without a license from the State Board of Higher Education. Shelton filed notice of appeal to the Appellate Division.

On April 14, 1981, a divided Third Circuit upheld the Federal District Court's order granting injunctive relief, and approved the court's decision to stay further federal proceedings pending completion of the state court action. On May 18, 1981, the District Court entered a revised preliminary injunction that prohibited the State Board of Higher Education from enforcing or implementing the Superior Court's order of December 10, 1980,

1. The Superior Court subsequently modified its preliminary order to conform with the federal court's preliminary injunction.

"until such time as the Supreme Court of New Jersey definitively construes the New Jersey statutes and regulations which are the subject of this action." *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 514 *F. Supp.* 506, 515 (1981). We directly certified the matter on petition of the parties. ___*N.J.* ___(1981).[2]

II.

Before addressing the constitutional issues raised by this appeal, we first consider whether *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6 apply to religious institutions such as Shelton College. Read literally, these statutes clearly encompass Shelton College. They require that *all* institutions — regardless of religious character or affiliation — obtain a license before offering degree programs or conferring degrees. Nonetheless, defendants urge us to adopt a narrowing construction of these statutes — excluding Shelton from their ambit — so as to avoid the constitutional issues that otherwise would emerge. Defendants suggest that this result could be achieved by employing a standard of statutory construction announced by the United States Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 *U.S.* 490, 59 *L. Ed.* 2d 533 (1979). In that case the court declared that any interpretation of a statute that "would give rise to serious constitutional questions" must be rejected unless the construction is compelled by "the affirmative intention of the Congress clearly expressed." *Id.* at 501, 59 *L. Ed.* 2d

2. We do not pass upon the complex problems of federalism presented by the movements of the parties between state and federal courts. Those issues divided the appeals panel in this case, *N.J. Phila. Presbytery v. N.J. State Bd.*, 654 F. 2d 868 (1981). *Cf. Middlesex Ethics Committee v. Garden State Bar Association et al.*, ___*U.S.* ___ (1982) (federal courts should abstain from interfering with ongoing disciplinary proceedings where proceedings provided attorney under investigation with adequate opportunity to present constitutional claims).

at 541. Applying this standard, the Court held that the National Labor Relations Act does not extend to lay teachers employed by parochial schools, even though the act's general terms include such employees. The Court concluded that application of the National Labor Relations Act to church-operated schools would implicate the Religion Clauses of the First Amendment but that there existed no affirmative expression of legislative intent sufficient to compel the constitutionally troublesome interpretation of the act.

Four dissenting justices assailed the Court's opinion, stating that the majority had "seemingly invented . . . a canon of statutory construction . . . for the purposes of deciding this case." The dissent would have adhered to the principle of statutory construction set out in *Machinists v. Street*, 367 *U.S.* 740, 6 *L. Ed.* 2d 1141 (1961):

> "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided." *Crowell v. Benson*, 285 *US* 22, 62, 76 *L Ed* 598, 619.
>
> [*Id.* at 749, 750, 6 *L. Ed.* 2d at 1150 (emphasis added)].

The dissent concluded that

> . . . [W]hile the resolution of the constitutional question is not without difficulty, it is irresponsible to avoid it by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent. A statute is not "a nose of wax to be changed from that which the plain language imports. . . ." Yu Cong Eng v. Trinidad, 271 US, at 518, 70 L Ed 1059, 46 S Ct 619.

[*NLRB v. Catholic Bishop of Chicago, supra*, 440 *U.S.* at 518, 59 *L. Ed.* 2d at 552].

Under New Jersey law, a challenged statute will be construed to avoid constitutional defects if the statute is "reasonably susceptible" of such construction. *State v. Profaci*, 56 *N.J.* 346, 350 (1970); *Woodhouse v. Woodhouse*, 17 *N.J.* 409, 416 (1955). Thus, our standard for construing statutes of uncertain constitutionality closely resembles the principle of construction advocated by the dissent in *Catholic Bishop*. But even if we were to accept the broader standard elaborated by the *Catholic Bishop* majority, we would still be constrained to find that the New Jersey licensing statutes apply to Shelton College.

The Legislature's intent with regard to these statutes is clear and unambiguous. *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6 speak in absolute terms. They prohibit the granting of baccalaureate degrees by *any* institution that has not secured a license from the State Board of Higher Education. The sole exception to this regulatory scheme appears in *N.J.S.A.* 18A:68-6. There the Legislature expressly exempted institutions that were operating on April 1, 1887 by virtue of special legislative grant. See *L.* 1912, *c.* 315; *Shelton I*, *supra*, 48 *N.J.* at 507. No such exemption was created for sectarian colleges. Nor does the legislative history even hint at an intent to exclude religious schools from the scope of these statutes. To the contrary, the history of the higher education licensing provisions demonstrates a legislative intent to regulate the conferring of baccalaureate degrees by religious as well as secular institutions. See *Id.* at 509-16.

The first higher education "approval" statute, entitled "An Act to prescribe the terms and conditions under which degrees may be conferred by any school or institution of learning within this State," was adopted in 1912. *L.* 1912, *c.* 315. This legislation did not, however,

mark the State's first involvement with the bachelor's degree. Prior to 1912 the Legislature passed several special acts of incorporation that authorized a number of secular and sectarian institutions to confer baccalaureate degrees. Passage of these acts evidenced the Legislature's belief that even a sectarian college's power to confer degrees could be conditioned on state authorization. There is no reason to infer that the Legislature's view in this regard changed before passage of *L.* 1912, *c.* 315. We must assume therefore that when the Legislature adopted *L.* 1912, *c.* 315, it was aware of the existence of religiously oriented colleges. We must also assume that the Legislature understood that such institutions would come within the literal terms of the statute. Yet, although the act included an express exemption clause, it contained no exemption for religious colleges.

Related provisions of New Jersey education law supply further evidence of legislative intent. Thus *N.J.S.A.* 18A:68-2 provides that seminaries and schools of theology may grant bachelor's degrees "*subject to the provisions of this chapter.*" (Emphasis added.) This statute appears in Chapter 68 of the education laws, together with the licensing statutes.

The current statutory scheme also confirms that the Legislature affirmatively intended to regulate the conferring of degrees by religious institutions. In 1966, the Legislature created a Department of Higher Education, the office of Chancellor of Higher Education, and a Board of Higher Education. *L.* 1966, *c.* 302, §§1, 2 (see now *N.J.S.A.* 18A:3-1, -6, -20). The Board has been given broad authority over the system of higher education in this State. *N.J.S.A.* 18A:3-13. See, *Association of New Jersey State College Faculties v. Dungan*, 64 *N.J.* 338 (1974). Pursuant to *N.J.S.A.* 18A:3-13, it is the duty of the Board "to advance long-range planning for the system of higher education *as a whole* in the State." (Emphasis added.) Religious oriented colleges and universities comprise a significant proportion of the institutions

of higher learning in this State. If such institutions were permitted to reject even minimal state regulation, the legislative intent manifested by these education laws would be defeated.

Finally, the practice relative to *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6 has been to apply the licensing requirements to all degree-granting institutions, regardless of religious affiliation. The Legislature has acquiesced in this long-standing practice. This is strong evidence that the current application of these statutes conforms to legislative intent. *See, Division of Taxation v. Body-Rite,* ____*N.J.* ____(1982).

In summary, we see no basis to infer that the Legislature intended to exempt Shelton College and like institutions from the requirements of *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6. We construe statutes in accord with the Legislature's intent, even if to do so will give rise to substantial constitutional questions. We hold that *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6 apply to Shelton College.

III.

We turn now to defendants' claim that application of *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6 to Shelton College unconstitutionally infringes upon the free exercise of their religion. Decisions in cases such as this regrettably involve courts in an examination of religious practices and inevitably call for "a delicate balancing of important but conflicting interests." *Wisconsin v. Yoder,* 406 *U.S.* 205, 237, 32 *L. Ed.* 2d 15, 38 (1972) (White, J., concurring). In this case we must decide whether the State's interest in regulating academic degrees constitutionally justifies the burden that such regulation may impose on defendants' freedom to hold and practice their religious beliefs.

We begin by determining whether application of the statutory licensing requirements to Shelton College in-

terferes with the free exercise of defendants' religion. Defendants profess as a principle of their faith that the Bible commands the separation of church and state. Recently, the Bible Presbyterian Church interpreted this religious precept as prohibiting Shelton College from submitting to licensure by the New Jersey Board of Higher Education. We note, however, that defendants did apply for renewal of Shelton's Florida license subsequent to their espousal of this scriptural interpretation.

Although the First Amendment wisely prohibits courts from questioning the validity of religious beliefs, *United States v. Ballard*, 322 *U.S.* 78, 88 *L. Ed.* 1148 (1944), it does not preclude judicial inquiry into the sincerity of those who claim exemption on religious grounds from a law of general application. *Id.* Despite defendants' apparently inconsistent adherence to the asserted religious tenet, however, we decline to inquire into their sincerity on the record before us. Rather, we shall assume, for purposes of this appeal, that licensure of Shelton College would conflict with a principle of defendants' religion.

Accepting this assumption, the Board of Higher Education nonetheless maintains that application of *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6 to Shelton College does not abridge defendants' Free Exercise rights. The Board points out that even if enforcement of those statutes against Shelton causes the college to close, no direct interference with religious practice occurs because defendants' religion does not require attendance at Shelton Collge.

This argument undervalues the constitutional right to exercise one's religion freely. The First Amendment guarantee of religious freedom protects against more than direct state proscription of religious practices. See, *e.g., Cantwell v. Connecticut*, 310 *U.S.* 296, 84 *L. Ed.* 1213 (1940). Any state action that unduly burdens the free exercise of religion violates the First Amendment. *Thomas v. Review Bd. Indiana Emp. Sec. Div.*, 450 *U.S.*

707, 67 *L. Ed.* 624 (1981); *Wisconsin v. Yoder, supra*, 406 *U.S.* at 220, 32 *L. Ed.* 2d at 28; *Sherbert v. Verner*, 374 *U.S.* 398, 404; 10 *L. Ed.* 965, 970 (1963). Even facially neutral legislation may give rise to a burden on religion if, as applied to a particular religious sect, it forces individuals to choose between abandoning their religious beliefs or sacrificing an important government benefit.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists.
>
> [*Thomas v. Review Bd. Indiana Emp. Sec. Div., supra*, 405 *U.S.* at 717-18, 67 *L. Ed.* 2d at 634].

In *Thomas* a Jehovah's Witness refused on religious grounds to accept work building weapons. Indiana officials rejected Thomas' application for unemployment compensation, ruling that he had failed without good cause to accept employment and was therefore ineligible to receive benefits. Thus, Indiana's unemployment compensation law effectively forced Thomas to choose between his faith and financial benefits that he may well have needed to subsist. The Supreme Court held that imposition of this choice violated the Free Exercise clause of the First Amendment.

In an analogous manner, *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6 require defendants to choose between a tenet of their religion and the privilege of conferring baccalaureate degrees. Clearly the dilemma that New Jersey's education law poses for defendants is not as cruel or coercive as was the choice thrust upon Thomas by the Indiana Unemployment Compensation Act. Nevertheless, we must conclude that the New Jersey

licensing statutes, as applied to Shelton College, impose some burden on the exercise of religion.

This conclusion does not, however, terminate the inquiry. Not all burdens on religion are unconstitutional. *United States v. Lee*, ____*U.S.* ____, 71 *L. Ed.* 2d 127 (1982). *Prince v. Massachusetts*, 321 *U.S.* 158, 88 *L. Ed.* 645 (1944); *Smith v. Ricci*, 89 *N.J.* 514 (1982). Legislation that impedes the exercise of religion may be constitutional if there exists no less restrictive means of achieving some overriding state interest.[3] Thus, in *United States v. Lee, supra*, the Court held that although the Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system, they must nevertheless withhold, report and pay social security taxes on their employees. The Court said:

> The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.
>
> [*United States v. Lee, supra*, ____*U.S.* at ___, 71 *L. Ed.* 2d at 132 (citations omitted)].

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3. A recent Federal Court of Appeals decision, *Bob Jones Univ. v. U.S.*, 639 *F.* 2d 147, 153 (4th Cir. 1980), *cert.* granted ____*U.S.*, more fully explicated this standard.

> Assuming that the revocation of [tax exempt] status does impinge upon the university's practice to some extent the question remains one of balancing — giving due consideration to the weight of the interests asserted by the government and the extent and nature of the burden on the religious practice and the religion as a whole.

The legislation at issue here advances the State's interest in ensuring educational standards and maintaining the integrity of the baccalaureate degree. Chief Justice Weintraub amply described the depth and importance of this interest from medieval times to the present in *Shelton I, supra*, 48 *N.J.* at 510-15. We need not reconstruct that discussion here. That Court's views may be summarized:

> Whatever the reason for the modest governmental activity in this area, it was not for doubt as to the power of the States to act. In *Trustees of Dartmouth College v. Woodward*, 4 *Wheat.* 518, 634, 4 *L. Ed.* 629, 658 (1819), in which the charter of incorporation was held to be a contract the State could not undo, Chief Justice Marshall said, in axiomatic style:
>
> > "That education is an object of national concern, and a proper object of legislation, all admit." [48 *N.J.* at 510-11].[4]

Shelton's education expert testified that the bachelor's degree has been severely devalued by recent trends in education and that therefore the State currently has no significant interest in regulating the award of such degrees. Other educators have earnestly urged the contrary. In their *amicus* brief to this Court, the

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4. The Court recalled that the Supreme Court of Vermont refused to imply in a general charter the power to confer degrees, saying in *Townshend v. Gray*, 62 *Vt.* 373, ____, 19 *A.* 635, 636, 8 A.L.R. 112, ____(1890):

> * * *To hold that the legislature, by a general law, intended that any three men in any town in the state, however illiterate or irresponsible, might organize and flood the state with doctors of medicine, doctors of law, doctors of divinity, masters of arts, civil engineers, and all the other various titles that everywhere in the civilized world have signified high attainments and special equipment for professional work, is to liken it to the witty French minister who threatened to create so many dukes that it would be no honor to be one, and a burning disgrace not to be one.

Association of Independent Colleges and Universities of New Jersey[5] maintained that "there is a general expectation that institutions permitted to award degrees in this State will at least meet basic standards of educational integrity." *Amicus* stressed the importance of maintaining the value and integrity of academic degrees, and expressed the fear that, if such degrees are permitted to erode in value, "if there no longer can be a presumption of minimum standards — then students, educational institutions and the public will be harmed."

In addition, the legislation supports the State's purpose of protecting students, as potential consumers of higher education, from substandard education. It allows them to assume by virtue of a school's ability to grant degrees that it meets certain minimum standards.

That maintenance of minimum educational standards in all schools constitutes a substantial state interest is now beyond question. See, *e.g., Wisconsin v. Yoder, supra; Lemon v. Kurtzman*, 403 *U.S.* 602, 29 *L. Ed.* 2d 745 (1971); *Pierce v. Society of Sisters*, 268 *U.S.* 510, 69 *L. Ed.* 1070 (1925). Nothing in this record persuades us to the contrary. The Legislature has attached great importance to the fulfillment of these goals. We have no doubt of that legislative appraisal and conclude that the New Jersey licensing statutes are supported by a strong state interest in maintaining minimum academic standards and preserving the basic integrity of the baccalaureate degree.

Having reached this conclusion, we must now decide whether granting defendants a religious exemption from the licensing statutes would significantly hinder attainment of the state interest. If so, the statutes present the least restrictive means of fulfilling an overriding governmental interest and, as such, do not abridge de-

5. The Association of Independent Colleges and Universities of New Jersey is a membership organization composed of sixteen private nonprofit institutions of higher education. Ten of its member institutions have religious affilations.

fendants' rights of religious freedom. *U.S. v. Lee, supra,* ____*U.S.* at ____, 71 *L. Ed.* 2d at 133.

In New Jersey, the conferring of a baccalaureate degree connotes that certain minimum standards have been met by the issuing institution, and that the degree recipient has attained at least a basic level of academic proficiency. To this extent the value of academic degrees from New Jersey institutions traces directly to state regulation. Thus, by claiming a complete exemption from all state regulation defendants in effect ask that they be given a benefit without having to accept the correlative burden. In this sense, if the First Amendment requires that Shelton be permitted to confer degrees without a license, it must also require that unemployment compensation be disbursed to individuals who for religious reasons refuse to accept any employment whatsoever. *Sherbert* expressly warned that the First Amendment compels no such result. *Id.*, 374 *U.S.* at 409-10; 10 *L. Ed.* 2d at 974.

Sherbert, Thomas and *Yoder* all hold that religious exemptions from neutral legislation must be provided where uniform enforcement of the legislation will unduly impinge upon the exercise of religion. But, as the Court in *U.S. v. Lee, supra,* recognized, the First Amendment does not require the provision of religious exemptions where accommodation would significantly interfere with the attainment of an overriding state interest. Such a requirement, the Court observed, would "radically restrict the operating latitude of the Legislature." *Id.* at ____, 71 *L. Ed.* 2d at 134 (quoting *Braunfield v. Brown,* 366 *U.S.* 599, 606, 6 *L. Ed.* 2d 563, 568 (1961)). Commentators have observed that it is when the religious exercise does "not materially affect the working of the secular program" that the free exercise claim is recognized. Freund, "Public Aid to Parochial Schools," 82 *Harv. L. Rev.* 1680 (1969). See also Clark, "Guidelines for the Free Exercise Clause," 83 *Harv. L. Rev.* 327 (1969). Here, accommodation of defendants' religious

beliefs would entail a complete exemption from state regulation. As noted above, such accommodation would cut to the heart of the legislation and severely impede the achievement of important state goals. Furthermore, if an exemption were created here, Shelton College would receive an advantage at the expense of those educational institutions that have submitted to state regulation. Such a development would undermine the integrity of the baccalaureate degree, erode respect for the state higher education scheme, and encourage others to seek exemptions. Thus, the uniform application of these licensing requirements is essential to the achievement of the State's interests. *See Braunfield v. Brown, supra* (state interest in uniform day of rest constitutionally justifies refusal to create religious exemptions to Sunday closing law). *See also U.S. v. Lee, supra,* ____*U.S.* at ____, 71 *L. Ed.* 2d at 135-36 (Stevens, J., concurring).

In sum, although defendants' freedom of religion may suffer some indirect burden from this legislation, the constitutional balance nonetheless favors the state interest in uniform application of these higher education laws. As the U.S. Supreme Court noted,

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.
>
> [*U.S. v. Lee, supra,* ____*U.S.* at ____, 71 *L. Ed.* 2d at 134-35].

We conclude that *N.J.S.A.* 18A:68-3 and *N.J.S.A.* 18A:68-6 as applied to Shelton College do not abridge rights guaranteed by the Free Exercise Clause of the First Amendment.

The Establishment Clause requires that a law reflect a secular legislative purpose, have a primary effect that

neither advances nor inhibits religion, and avoid excessive entanglement with religion. *Committee for Public Education and Religious Liberty v. Regan*, 444 *U.S.* 646, 63 *L. Ed.* 2d 94 (1980); *Committee for Public Education v. Nyquist*, 413 *U.S.* 756, 37 *L. Ed.* 2d 948 (1973); *Marsa v. Wernik*, 86 *N.J.* 232 (1981); *Resnick v. E. Brunswick Tp. Bd. of Ed.*, 77 *N.J.* 88 (1978). The secular purpose of the State's program for higher education is unassailable. Defendants assert, however, that this regulatory scheme creates an excessive state entanglement with religion.

The United States Supreme Court has never questioned a state's interest in insuring, through licensure or accreditation, minimal academic standards in church-operated institutions.[6] *See, e.g., Pierce v. Society of Sisters, supra.* As stated in *Lemon v. Kurtzman, supra*:

> We . . . have surveillance over sectarian schools but only to the extent of making sure that minimum educational standards are met, *viz*, competent teachers, accreditation of the school for diplomas, the number of hours of work and credits allowed, and so on. . . . Any surveillance to date has been minor and has related only to the *consistently unchallenged*

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6. Some state courts have invalidated comprehensive state licensing or approval powers over private religious schools where, as one court said, the minimum standard scheme was "so pervasive and all-encompassing that total compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and nonpublic education." *State v. Wisner*, 47 *Ohio. St.* 2d 181, 351 *N.E.* 2d 750 (1976). *See also, Kentucky State Board for Elementary and Secondary Education v. Rudasill*, 589 *S.W.* 2d 877 (Ky. 1979), *cert.* denied, 446 *U.S.* 938 (1980) (court based its decision on section 5 of the Kentucky Constitution, which states that "[n]o man [shall] be compelled to send his child to any school to which he may be conscientiously opposed. . . ."); *State v. LaBarge*, 134 *Vt.* 276, 357 *A.* 2d 121 (1976) (truancy). *But see Bob Jones University v. United States, supra*, and *Brown v. Dade Christian Schools*, 556 *F.* 2d 310 (5th Cir. 1977), *cert.* den., 434 *U.S.* 1036, where religious belief in racial discrimination conflicts with governmental policy.

matters of accreditation of the sectarian school in the State's school system.

> [403 *U.S.* at 631, 29 *L. Ed.* 2d at 766 (Douglas, J., concurring) (emphasis supplied)].

The Establishment Clause permits minor, unobtrusive state supervision of religiously oriented schools. *Roemer v. Maryland Public Works Bd.*, 426 *U.S.* 736, 49 *L. Ed.* 2d 179 (1976). Only excessive entanglement is proscribed. None of the education statutes or regulations here in question mandates "active involvement of the sovereign in religious activity." *Walz v. Tax Commissioner*, 397 *U.S.* 664, 668; 25 *L. Ed.* 2d 697, 701 (1970). None authorizes state regulation of the *content* of an educational program. Nor does the regulatory scheme on its face require "comprehensive, discriminating and continuing state surveillance."[7] *Lemon v. Kurtzman, supra,*

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7. In order to determine the nature of an institution, the State Board requires a statement of educational purpose, *N.J.A.C.* 9:1-1.2. The institution is then required to show that its various elements (faculty work, educational program, student life, finances, physical plant, organization and administration) are organized in a way supportive of this purpose. *N.J.A.C.* 9:1-1.2(b)(2). The institution must develop a long-range plan for implementing its goals, as well as periodically review its purpose and plans. *N.J.A.C.* 9:1-1.2(b)(3),(4); *N.J.A.C.* 9:1-1.3(a)(1). It is also required to conduct its affairs in a financially prudent manner, for its own protection and the protection of its students, creditors and other citizens. *N.J.A.C.* 9:1-1.4. The maintenance of legitimate financial records and insurance protection are intended to "assure the continuity of the institution." See *N.J.A.C.* 9:1-1.4(b). The regulations also recognize the importance of an adequate library. *N.J.A.C.* 9:1-1.8. There are suggested standards for admission to the institution. For example, the regulations propose that *normally* a high school diploma should be required. *N.J.A.C.* 9:1-1.9(b)(1). Adequate and safe physical facilities are also required. *N.J.A.C.* 9:1-1.10. In any areas where standards are proposed, however, no rigid mandates are maintained. Paragraph 5 of the Foreword to Title 9 of the New Jersey Administrative Code expresses this policy:

> The standards specify desirable and acceptable practices which further implement the good intentions of the law but are

403 *U.S.* at 619, 29 *L. Ed.* 2d at 759. Although the regulations in this area, *N.J.A.C.* 9:1-1 to -2.14, appear to be burdensome, especially as applied to a college of approximately 30 students, they explicitly call for flexibility in their administration so as to accommodate various institutions with diverse educational goals.[8] *N.J.A.C.*, Title 9, Foreword. Because Shelton College declined even to complete the licensing process, the allegation of excessive entanglement rests on speculation about the manner in which these statutes and regulations might be applied. Although one could imagine an unconstitutional application of this regulatory scheme, we are confident that the Board of Higher Education will pursue the least restrictive means to achieve the State's overriding concerns. Of course, should the Board exercise its discretion in a manner that unnecessarily intrudes into Shelton's religious affairs, the college would then be free to challenge the constitutionality of such action. At this juncture, however, we need not invalidate these statutes merely because they may be amenable to an unconstitutional application.

> . . . It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional [action].

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not required in a specific form so that institutional flexibility may be maintained. . . .

8. The licensing procedures also engender a high degree of flexibility. Pursuant to *N.J.A.C.* 9:1-2.4 the Licensure and Approval Advisory Board is composed of seven representatives from various state and county colleges and universities, three representatives of the Association of Independent Colleges and Universities in New Jersey (AICUNJ), three persons representative of colleges not members of AICUNJ and one representative of the Department of Higher Education. The Board makes recommendations to the Chancellor regarding policies for licensure and specific petitions for licensure. *N.J.A.C.* 9:1-2.7. Participation in the licensing process by this diverse group representing both public and private institutions, seeks to ensure practicality in the administration of the program.

[*Roemer v. Maryland Public Works Bd., supra*, 426 *U.S.* at 761, 49 *L. Ed.* 2d at 196].

See *Village of Hoffman Estates v. Flipside Hoffman Estates Inc.*, ____ *U.S.* ____, ____ *L. Ed.* 2d ____ (1982); *I/M/O Application of Maria Martin*, ____ *N.J.* ____ (1982).

V.

In sum, we find that the State's program for licensing institutions of higher education is applicable to sectarian institutions and that facially it does not unduly interfere with the free exercise of religion nor create an excessive state entanglement with religion. At the same time, we recognize the good faith with which the students of Shelton College have pursued their educational and religious goals. To accommodate the free exercise interests of the individual students without unduly interfering with the state regulatory program, and in consideration of the difficulty involved in transferring to a different college at the end of three years, we modify the judgment below to allow the awarding of earned credits and degrees to all eligible students through the end of the 1982-83 academic year and to the class of 1984 through the end of the 1983-84 academic year. No other credits or degrees shall be awarded without licensure.

As modified, the judgment of the Chancery Division is affirmed.

Chief Justice Wilentz and Justices Pashman, Clifford, Schreiber, Handler and Pollock join in this opinion.

APPENDIX D

Second Opinion and Order of the United States District Court for the District of New Jersey, dated May 18, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 79-3341

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYERTIAN CHURCH; SHELTON COLLEGE, A Ministry of Bible Presbyterian Church; BIBLE PRESBYTERIAN CHURCH OF COLLINGSWOOD, NEW JERSEY; KEVIN WILSON, BRAD GSEL, KEVIN CLAIR MICHAEL, CURTIS JORDAN BASHAW, LOUISE OLSON and EVERETTE CHARLES OLSON,

Plaintiffs,

v.

NEW JERSEY STATE BOARD OF HIGHER EDUCATION; T. EDWARD HOLLANDER, Chancellor of New Jersey Department of Higher Education; RICHARD D. BRESLIN, Assistant Chancellor for Academic Affairs of the New Jersey Department of Higher Education; and AMORITA SUAREZ, Director of the Office for Independent Colleges and Universities of the New Jersey Department of Higher Education,

Defendants.

OPINION

DEBEVOISE, *District Judge.*

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This is an application by plaintiffs for a temporary restraining order and preliminary injunction.

Procedural History

An understanding of the procedural history of this case and its related state court case is necessary in order to address the merits of plaintiffs' application.

On November 15, 1979 the New Jersey State Board of Higher Education and T. Edward Hollander, Chancellor of the New Jersey Department of Higher Education, instituted an action in the Superior Court of New Jersey, Chancery Division, naming as defendants The Board of Directors of Shelton College and Glenn Rogers and Carl McIntire, two officers of the College. The complaint sought declaratory and injunctive relief, alleging that Shelton was offering courses of instruction for credit without the requisite licensing by the State Board. The Superior Court forthwith issued a temporary restraining order enjoining Shelton's educational and instructional activities.

On November 19, 1979 the plaintiffs in the present case filed in this Court an action under 42 U.S.C. § 1983 alleging, among other things, that the efforts of the State Board to prevent Shelton's educational and instructional activities unless it complied with New Jersey's licensing scheme violated their rights to the free exercise of religion and unduly entangled the State in the affairs of a religious institution. The plaintiffs in the federal court action are Shelton, the New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church (the regional ruling body of the Bible Presbyterian Church), Bible Pres-

byterian Church of Collingswood, New Jersey, four full-time students at Shelton, two parents of students, and a professor of mathematics and chemistry at Shelton. The defendants in the federal court action are the State Board and several individual state officials charged with the enforcement of the licensing regulations.

The federal plaintiffs sought a preliminary injunction. After an evidentiary hearing I entered an order which, among other things, enjoined the federal defendants from taking or permitting the taking of any action having the effect of preventing Shelton from engaging in any religious, teaching or educational activities, or from publicizing or advertising such activities. I did not reach the principal issue, namely, whether the State Board's licensing procedures, if applicable to Shelton, would constitute a violation of the Religion Clauses of the First Amendment. I abstained as to that issue and stayed the federal proceedings until the state court had an opportunity to determine whether the licensing requirements applied to a religious institution such as Shelton. If they do not, there would be no need to reach the difficult constitutional issue posed in this case, *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

Thereafter, the litigation proceeded on two fronts. Both sides appealed this Court's interlocutory order, which both granted and denied injunctive relief, to the Court of Appeals for the Third Circuit. The state court action went to trial.

On November 7, 1980 the state court rendered its opinion. The opinion held: (i) subjecting Shelton to the New Jersey licensing and approval scheme is "not violative of the free exercise clause and provide[s] for minimal and

non-excessive entanglement between church and state" and (ii) Shelton's rights of free speech, guaranteed under the First and Fourteenth Amendments of the Constitution, would be impaired if the court denied Shelton the right to call itself a "College", notwithstanding the prohibitory language of N.J.S.A. 18A:67-2.

The state court issued a permanent injunction on December 10, 1980. It prohibited Shelton from awarding a degree "for any coursework or course of instruction which has transpired in whole or in part at Shelton College in the State of New Jersey"; it declared that Shelton must obtain a license from the State Board before it awards any collegiate degrees in New Jersey; it required that Shelton delete all references in its publications which state that Shelton will award collegiate degrees until it it licensed by the State Board; and it ordered that Shelton "shall cause to be inserted in all applications for admission to Shelton College a statement that, pursuant to the order of this Court, said institution is prohibited from awarding baccalaureate or collegiate degrees for coursework which takes place in whole or in part in the State of New Jersey, unless or until a license is issued to defendants by the New Jersey State Board of Higher Education".

On January 16, 1981, Shelton and the other state court defendants noticed an appeal to the Appellate Division of the Superior Court of New Jersey. That appeal is pending.

On April 14, 1981 the Court of Appeals for the Third Circuit filed its opinion, Docket Nos. 80-1253, 80-1254 and 80-2703. The majority opinion held that *Younger* abstention, *Younger* v. *Harris*, 401 U.S. 37 (1971), is inapplic-

able in this case by reason of the presence of plaintiffs in the federal action who were not parties to the state action. Thus, this Court's limited injunctive relief was proper. The Court of Appeals upheld a *Pullman* abstention on the constitutional issue and the entry of a *Pullman*-type stay "with a retention of jurisdiction to consider further injunctive relief when the state court construes the statute and regulations". Slip Op., 38. In affirming this Court's exercise of its discretion to abstain under the *Pullman* doctrine, the Court of Appeals noted, perhaps pointedly, that "the district court did not leave the plaintiffs entirely unprotected. It reserved jurisdiction to consider further applications for interim relief." Slip Op., 38-40.

The federal plaintiffs now seek such interim relief. It is their contention that the state court has interpreted New Jersey's college licensing statutes in a manner which violates their First Amendment religious rights, that the injunctive order implementing this determination of the state court will, unless set aside, cause the demise of Shelton College, a religious institution, and that if the federal plaintiffs are required to wait until the state action proceeds through the Appellate Division of the New Jersey Superior Court, the New Jersey Superior Court. the New Jersey Supreme Court and perhaps the United States Supreme Court, ultimate success would be hollow indeed, as the religious institution they sought to preserve would long have been interred.

The federal plaintiffs now seek a temporary restraint and a preliminary injunction restraining the federal defendants from enforcing or implementing the state court's order of December 10, 1980 until such time as the Su-

preme Court of New Jersey definitively construes the applicable New Jersey statutes and regulations.

Findings of Facts

I incorporate herein the findings of fact which are set forth in my original opinion, 482 F. Supp. 968 (D.N.J. 1980). I do not believe that they are in dispute. It was established that Shelton is a religious institution and that its students, faculty and parents regard it as a vehicle to further their all-pervasive religious beliefs and practices.

Additional facts have been established by affidavits and testimony introduced in support of the federal plaintiffs' present application.

During the pendency of these actions in the state and federal courts Shelton has been unable to grant degrees to students who have completed the academic requirements of the College. The disclaimer which Shelton is required under the state court order to insert in all its publications and on all application forms sent to prospective students has a highly destructive impact upon everything else which appears in those publications. There is nothing to suggest that the publications do not truthfully describe the kind of education which Shelton offers and the religious orientation of every phase of its program. There is nothing to suggest that, absent the state mandated material, any prospective parent or student would be mislead in any way about Shelton's educational program.

After attempting to operate in Florida for a period of approximately eight years, Shelton returned to its

Cape May campus in the summer of 1979. During the 1979-80 school year it began operations with 28 students. This increased to only 41 to 35 students in the 1980-81 school year. Moreover, as of the present time it has only six applicants for its fall, 1981 freshman class, none of whom have yet been determined to be qualified for admission. It is reasonable to conclude that in part, at least, the College's enrollment has been adversely affected by the inhibitions imposed upon it by the State.

Shelton has experienced a steady drop in the amount of contributions it receives from the public since the time of the institution of the state court action. The pending state litigation, the inability of the College to grant its degrees, the disclaimer the College is required to issue and resulting adverse publicity have resulted in loss of confidence in the ability of the College to survive.

It is impossible to determine whether Shelton would survive if the State injunction were lifted; however, there is little question but that Shelton cannot long exist if the state court injunction remains in effect.

In addition to Shelton's future prospects, its present students have been affected by the state court injunction. At the graduation in May, 1980, four students who had completed four years of study at Shelton in Florida and New Jersey were denied their degrees. Shelton's annual commencement exercise is scheduled for May 23, 1981. On that date eight students who have successfully completed four years of study at the College and who have been determined by the College to possess the religious and moral qualifications requisite for graduation will be eligible to be awarded Shelton's Bachelor of Arts in Biblical Literature, Elementary Education, History or

English. By reason of the court decree, of course, these indicia of their work at Shelton cannot be conferred upon them.

The question must now be answered whether the federal plaintiffs are entitled to the relief they seek.

Conclusions of Law

First I shall direct myself to the grounds which the federal defendants (who I shall hereinafter refer to as the "State Board") advance as comity reasons why the application should not be granted.

Once again the State Board urges that *Younger* abstention is called for. This argument has been disposed of by the Court of Appeals. There the majority opinion concluded that *Younger* is not applicable at all because the parties in the federal action are substantially different from the parties in the state action. The minority opinion concluded that *Younger* is applicable but that a *Younger*-based exception supported the limited injunctive relief previously granted in this Court. If the federal plaintiffs are correct in their view that New Jersey may not constitutionally apply its licensing requirement to Shelton, I conclude that the same *Younger*-based exception would be applicable to the present application.

The State Board also urges that the federal plaintiffs have fully litigated both their state claims and their federal claims in the state court, and that, having lost there on all claims, they cannot come back to the federal court for a second bite at the apple.

It is unnecessary to decide whether Shelton took the steps required in the case of a *Pullman* abstention to re-

serve its rights in the state court litigation to have its federal claims heard by the federal court, *see England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). Quite likely the reasoning of the Court of Appeals majority opinion would lead to the conclusion that reservation or non-reservation of federal rights by the state court defendants would not affect the rights to a federal forum of the federal plaintiffs who are not parties to the state court action. In any event, this is a question which will not arise until the state court proceedings have been completed through final appeal, and then only if there still remains a federal question.

We are not at that stage now. We are dealing simply with an application for interim relief pending completion of the state proceedings. The Court of Appeals specifically recognized that such relief might be required and, if so, that it could appropriately be granted, Slip Op., 39-40.

The criteria to be applied in determining whether a preliminary injunction should issue are spelled out in the Court of Appeals opinion:

> . . . Once the court has concluded that an immediate dismissal on *Younger* grounds is inappropriate, a motion for preliminary injunctive relief, especially in first amendment contexts, ought, we think, to be considered without regard to the separate question whether a *Pullman* stay of final hearing is appropriate. Assuming the case is not to be dismissed outright, the district court should be guided by the classic requirements for a preliminary injunction:

> The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits.

Slip Op., 39.

The federal plaintiffs have established that they will suffer irreparable injury if the state court injunction continues in effect. It will result in the destruction of a religious educational community. At the time I issued the preliminary injunction now in effect, I had thought that this result could be avoided if Shelton were allowed to teach and advertise. It now appears that this is not enough and that if Shelton is to survive it must be able to award degrees to those who successfully complete its courses of instruction.

The major issue to be resolved is whether the federal plaintiffs are likely to prevail on the merits. The core question, therefore, is whether the State Board's exercise of licensing jurisdiction over a religious college such as Shelton "constitutes an improper breaching of the separation wall provided by the Religion Clauses of the First Amendment". *Catholic Bishop of Chicago* v. *N.L.R.B.*, 559 F.2d 1112, 1118 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979).

I have read with care the thoughtful opinion of the state court and fully recognize my own fallibility, of which the Court of Appeals all too frequently reminds me. Had I been required to reach the merits of this issue at the time I issued the preliminary injunction I think I would have decided the question in exactly the same way the state court decided it. However, with the bene-

fit of the Court of Appeals opinion, which was not available to the state court, I have considered the matter further and, for the reasons set forth below, I have concluded that the State Board may not, consistent with the First and Fourteenth Amendments, apply the State's licensing satutes and regulations to Shelton College and that, therefore, the federal plaintiffs are likely to prevail on the merits.

We start, of course, with the First Amendment to the United States Constitution, which reads, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." This is made applicable to the states by the Fourteenth Amendment. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Everson* v. *Board of Education*, 330 U.S. 1 (1946).

While the licensing of religious colleges and the regulation which that entails might be considered involvement by the state in the establishment of religion, the present case involves primarily a state prohibiting the free exercise of religion. Deciding whether this interference with the free exercise of religion is permissible entails the three-step inquiry utilized in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *see also McCormick* v. *Hirsch*, 460 F. Supp. 1337 (M.D. Pa. 1978): (i) It must be determined whether legitimate religious belief is held by the federal plaintiffs and whether Shelton is pervasively religious. (ii) It must be determined whether the free exercise rights of the federal plaintiffs would be either burdened or inhibited by the exercise of the State Board's regulatory powers over Shelton College. (iii) It must be determined whether the burdening of these rights is justified by a compelling state interest.

As to the first inquiry, it is beyond dispute that the individual federal plaintiffs and the members of the Bible Presbyterian Church and similar fundamentalist churches hold legitimate religious beliefs which are reflected in their life style and teaching. This is described in some detail both in my original opinion and in the opinion of the Court of Appeals.

Similarly, it beyond dispute that Shelton College plays a major role in the religious life of the members of the Bible Presbyterian Church. As was the case with Amish educational practices which were the subject of *Yoder*, Shelton provides its students and faculty a "way of life in a church-oriented community, separated from the outside world and 'wordly' influences". At 217. As in the case of parochial schools, which were the subject of such cases as *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), Shelton's "very purpose . . . is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious value and belief . . . '[T]he secular education these schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence' ". *Meek* v. *Pittenger*, *supra*, at 366. Although the line of cases typified by *Meek* and *Lemon* involve aid to religious schools, the same standards apply when state restrictions upon religious schools are involved, *Catholic Bishop of Chicago* v. *N.L.R.B.*, *supra*.

In addition to providing a community where persons of a defined religious group can live, learn and teach in accordance with their tenets, Shelton is a source of the church's clergy and lay leaders. It feeds students

to the church's seminary, and its students who do not become ordained ministers are likely to work on behalf of the church in other capacities.

Shelton's pervasively religious nature is described in further detail in my original opinion.

Thus, the federal plaintiffs meet the first test. They and their co-religionists hold legitimate religious beliefs and their college, Shelton, is pervasively religious.

As to the second test, it is clear, in light of the evidence submitted at the original hearing and at the most recent hearing, that the exercise of the federal plaintiffs' religion would be and is burdened by application of the State's licensing requirements. The New Jersey regulatory scheme (N.J.S.A. 18A:68-1, *et seq.*; N.J.A.C. 9:1-1.1 to 9:1-6.4) is described in some detail in the Third Circuit opinion, Slip op., 8-13. The State Board's "Guide for Obtaining the Basic Information for Appraising New Jersey Institutions of Higher Education" is set forth in an appendix to that opinion. An examination of the Guide demonstrates the intrusive nature of the State Board's inquiry into a college which it seeks to "appraise" and license. The Court of Appeals observed that "[t]he regulations are, in a word, pervasive". It noted that of particular relevance to a religiously affiliated institution is the regulation dealing with the required statement of institutional purpose:

> The requirement of a statement of purpose is not merely informational, for the regulation dealing with educational programs provides that '[t]he educational program shall reflect and support the purposes of the institution' and 'shall include course work and other activities extending over a suffi-

cient period of time and in sufficient intensity to fulfill the purposes of the institution.' N.J.A.C. 9:1-1.5(a) 1, 2.

Thus on the face of the regulations it would appear that in order to obtain a license, an institution with a religious commitment such as Shelton's must submit to the Board a statement of its religious purpose, as well as evidence that the various elements of its institutional life are structured to support that purpose, and must submit to the Board's judgment the question whether its educational program reflects and supports that purpose. Facially, therefore, the Board's licensing regulations suggest a very high degree of state entanglement in Shelton's religious affairs. And the 1916 law unambiguously prohibits instruction leading to a diploma or degree, even in theology, absent a license.[8]

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8. *Cf.* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502-03 (1979) (NLRB jurisdiction over alleged unfair labor practices in Catholic religious schools would result in impermissible entanglement, for the Board's resolution of unfair labor practices charges 'will necessarily involve inquiry into the good faith of the postion asserted by the clergy-administrators and its relationship to the school's religious mission.' Moreover, NLRB determination of the 'terms and conditions of employment' would enmesh the Board in 'nearly everything that goes on in the schools.').

Slip Op., 12, 13.

Apart from the subject matter covered by the regulatory scheme, compliance with its requirements imposes heavy burdens. The typical college could be expected to have on its staff the accountants, business managers and other technical personnel required to develop and present the information called for by the State Board's regulations. Shelton obviously does not have these resources. The New Jersey courts have recogized in analogous circumstances that a regulatory scheme cannot withstand a constitutional challenge when it exerts a substantially chilling effect upon the exercise of First Amendment rights of persons whose resources are so modest that they cannot reasonably be expected to comply with the regulations, *N.J. St. Chamber of Commerce* v. *N.J. Elec. Law*, 155 N.J. Super. 231 (App. Div. 1977).

As phrased by the United States Supreme Court, "[e]ach value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to or interfere with religious beliefs and practices *or have the effect of doing so*". *Walz* v. *Tax Commission, supra*, 669 (emphasis added).

Clearly, application of the State licensing regulations to Shelton has the effect of interfering with the religious beliefs and practices of members of the Bible Presbyterian Church and other similar fundamentalist churches. If Shelton could survive under such regulation and sought to comply therewith, the State would intrude pervasively into matters of religious faith and practice. As matters stand, it appears that Shelton cannot survive at all if New Jersey's licensing statutes and regulations are applied to it. In either event substantial religious rights are affected. It is not an answer to assert that Bible Presbyterians are not *required* to attend Shelton. In each

case, however, attendance is a means of strengthening, teaching and propagating a religious faith, and, in consequence, the institution is protected from undue state interference.

As an embellishment to the State regulatory scheme, and as a means to insure compliance with it, the state court has required that all Shelton informational material and applications contain a statement that Shelton is prohibited from awarding baccalaureate or collegiate degrees for coursework in New Jersey unless or until a license is issued to Shelton by the State Board. This order was entered apparently with no proof that the state defendants (Shelton, et al.) were misrepresenting their degree-giving capabilities or any other matters. It clearly imposed an additional burden on the ability of Shelton to operate and thus on the exercise of religious rights.

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705 (1977). Standing alone, this aspect of the state court's order raises serious constitutional questions. Viewed in conjunction with the regulatory scheme it seeks to enforce, it adds significantly to the burdens imposed upon the free exercise of religion.

Having concluded that the licensing scheme imposes a substantial burden upon the exercise of religion, it must be determined if this burdening of rights is justified by a compelling state interest.

The interest of the State involved in the licensing scheme is a significant and totally legitimate one—maintaining the integrity of the various degrees traditionally awarded by colleges by insuring compliance with minimum stand-

ards in the educational process leading to the award of a degree, *Shelton College* v. *State Bd. of Ed.*, 48 N.J. 501

Important as this interest may be, however, it cannot be used as a basis to impose substantial burdens upon the exercise of religion. The weighing process is guided by an examination of *Wisconsin* v. *Yoder, supra.* There the state's interest was a very substantial one—the proper education of young children, a process which is so important the state makes such education compulsory. Notwithstanding that vital state interest, the Supreme Court did not permit it to interfere with the religious practices of the Old Country Amish.

In the present case, the interest of New Jersey in the integrity of the traditional college degree is far less substantial than the interest of Wisconsin in the quality of education of secondary school students.

Illustrative of the lesser significance of this interest is the fact that New Jersey does not require that all colleges be licensed by the State Board before they are allowed to confer degrees. As noted in the State's own regulations:

> The current status of New Jersey independent institutions of higher education with respect to degree approval varies widely. At one extreme are the so-called pre-1887 institutions which are not required to secure the approval of the Board of Higher Education at all. At one extreme are the so-called pre-1887 institutions which are not required to secure the approval of the Board of Higher Education at all. At the other are some of the more recently founded institutions which have been granted approvals under conditions far more

> detailed than would be required by the policy set forth in this Subchapter. In between these extremes are other institutions—Upsala and the College of Saint Elizabeth are examples—which were granted broad powers by the State Board of Education following passage of the Acts of 1912 and 1916. N.J.A.C. 9:1-2.15 (footnote omitted).

The institutions which are not required to secure State Board approval are Drew University, Seton Hall University, St. Peter's College, St. Michael's Monastery, Stevens Institute of Technology, Princeton University and Centenary College for Women. Theoretically, any one of those colleges could adopt Shelton's educational program or any other program and their degree-awarding powers would be unaffected by the State Board's licensing regulations.

Further, Shelton has not been charged with fraud of misleading conduct. There has been no showing that any prospective students or parents of such students were or would be misled if Shelton were to award degrees for completion of its courses of study. Shelton's informational material is in the record and it clearly describes the kind of college Shelton is, the subject matter taught, and the all-pervasive religious perspective of the College.

Nor has it been shown that prospective employers of Shelton graduates or graduate schools to which Shelton students may apply will be misled by the award of Shelton degrees. It is common knowledge that all manner of institutions give all manner of degrees, having varying prestige and significance. In evaluating the significance of those degrees employers and graduate schools

look to the institutions which awarded the degrees, and they look to the public and private agencies which accredited such institutions. When appropriate, graduation from an accredited college or university is made the basis for qualification, *see*, for example, N.J. Court Rule 1:24-2(b) for the requirement for admission to the New Jersey bar examination of receipt of a degree from a law school approved by the American Bar Association.

Cases in this Court seeking the protection of the religious rights of state prisoners have disclosed the existence of small institutions of learning organized by the Black Muslim sect which award doctorate or other degrees. In at least one of these cases the Attorney General of New Jersey represented the State. These degrees are awarded without the imprimatur of the State Board; the members of the sect thereby have available to them a minister or imam or other officer who has received a degree whereby his sect certifies that he has successfully pursued a course of study prescribed by that sect; *see*, for example, *Malik Abdul Alim* v. *Brendan T. Byrne*, Docket Nos. 76-0499, 76-1661 (Unpublished Opinion filed July 8, 1980) (plaintiff's appeal pending).

Degrees have varying meanings and uses. As evidenced by N.J.A.C. 9:1-2.15, New Jersey requires some traditional colleges and universities to obtain state licenses before awarding a degree and it allows other traditional colleges and universities to award degrees without any state regulation whatsoever. It does not appear that the state makes any effort to regulate the granting of degrees by agencies of unconventional religious sects such as the Black Muslims. In the light of these facts it cannot be said that the state's interest in the integrity of degrees granted in New Jersey is so overwhelming that the reli-

gious rights of the Bible Presbyterians can be substantially impaired. Nor is the state's interest so overwhelming that it may, through the licensing process, entangle itself to a high degree in the religious activities of a wholly religious college.

The injunction of the state court enforces the application of the licensing statute and regulations against Shelton College. Since I have concluded that the federal plaintiffs are likely to prevail on the merits and that the application of the licensing statute and regulations against Shelton College is causing and will continue to cause them irreparable injury, the defendants in this case will be preliminarily enjoined from enforcing or implementing the order of December 10, 1980 of the Chancery Division of the New Jersey Superior Court until such time as the Supreme Court of New Jersey construes the New Jersey statutes and regulations which are the subject of this action.

Dated: May 18th, 1981.

DICKINSON R. DEBEVOISE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(D.C. Civil No. 79-3341)

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYERTIAN CHURCH; SHELTON COLLEGE, A Ministry of Bible Presbyterian Church; BIBLE PRESBYTERIAN CHURCH OF COLLINGSWOOD, NEW JERSEY; KEVIN WILSON, BRAD GSEL, KEVIN CLAIR MICHAEL, CURTIS JORDAN BASHAW, LOUISE OLSON and EVERETTE CHARLES OLSON,

Plaintiffs,

v.

NEW JERSEY STATE BOARD OF HIGHER EDUCATION; T. EDWARD HOLLANDER, Chancellor of New Jersey Department of Higher Education; RICHARD D. BRESLIN, Assistant Chancellor for Academic Affairs of the New Jersey Department of Higher Education; and AMORITA SUAREZ, Director of the Office for Independent Colleges and Universities of the New Jersey Department of Higher Education,

Defendants.

ORDER

AND Now, this 18th day of May, 1981, upon consideration of Plaintiffs' Motion for Preliminary Injunction and

Memorandum in Support thereof, and after hearing, and it further appearing to the Court that unless a preliminary injunction is entered, Plaintiffs will suffer immediate and irreparable injury resulting from enforcement of the Orders of the Superior Court of New Jersey, Chancery Division, prohibiting Shelton College from issuing baccalaureate or collegiate degrees and inhibiting the right of Shelton College to advertise within the College's own catalogue, and it further appearing to the Court that Defendants will not be harmed by the entry of such preliminary injunction, and the Court having filed an opinion setting forth its findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED AND DECREED THAT: Defendants and all other persons acting in their behalf are hereby restrained from enforcing or implementing the Order of December 10, 1980, in the case known and styled as *The New Jersey State Board of Higher Education, et al.* v. *The Board of Directors of Shelton College, et al.* (Superior Court of New Jersey, Chancery Division, Cape May County, Docket No. C-1088-79E), until such time as the Supreme Court of New Jersey definitively construes the New Jersey statute here complained of in light of Plaintiffs constitutional claims.

DICKINSON R. DEBEVOISE
United States District Judge

APPENDIX E

Opinion and Amendments of the United States Court of Appeals for the Third Circuit

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Nos. 80-1253, 80-1254 and 80-2703

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH; SHELTON COLLEGE, A Ministry of Bible Presbyterian Church; BIBLE PRESBYTERIAN CHURCH OF COLLINGSWOOD, NEW JERSEY: KEVIN WILSON, BRAD GSEL, KEVIN CLAIR MICHAEL, CURTIS JORDAN BASHAW, LOUISE OLSON AND EVERETTE CHARLES OLSON,

Appellants in Nos. 80-1253 and 80-2703

v.

NEW JERSEY STATE BOARD OF HIGHER EDUCATION; T. EDWARD HOLLANDER, Chancellor of New Jersey Department of Higher Education; RICHARD D. BRESLIN, Assistant Chancellor for Academic Affairs of the New Jersey Department of Higher Education; and AMORITA SUAREZ, Director of the Office for Independent Colleges and Universities of the New Jersey Department of Higher Education,

Appellants in No. 80-1254

(D. C. Civil No. 79-3341)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 16, 1980
Before GIBBONS and ROSENN, *Circuit Judges*,
and WEBER,* *District Judge*

(Opinion Filed April 14, 1981)

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* Hon. Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*.

We here consider cross appeals from an order of the district court granting in part and denying in part an application for preliminary injunctive relief against the enforcement of certain statutes and regulations of the State of New Jersey dealing with the licensing of private institutions of higher education.[1] The plaintiffs are Shelton College, a New Jersey corporation (Shelton), New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church, the regional ruling body of Bible Presbyterian Church, and Bible Presbyterian Church of Collingswood, New Jersey, a member of the Bible Presbyterian Church (the Churches); four full-time students at Shelton (the students); two parents of students (the parents); and Everette Charles Olson, professor of mathematics and chemistry at Shelton (the faculty member). The defendants are the New Jersey State Board of Higher Education and several individual state officials charged with the enforcement of the challenged regulations (the Board). We affirm.

I.

Facts and Proceedings in the District Court

As an essential part of their religious mission, the Churches, which are part of a nationwide fundamentalist Christian sect, sponsor Shelton, a small denominational institution which for several decades has been the principal source of the denomination's seminarians. Shelton owns a campus in Cape May, New Jersey. Since

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1. The opinion of the district court is reported. N.J.-Phila. Presbytery v. N.J. State Bd. of Ed., 482 F.Supp. 968 (D.N.J. 1980). The order appealed from both granted and denied a preliminary injunction. Thus we have appellate jurisdiction over both aspects of the challenged order. 28 U.S.C. §1292(a)(1).

1971 it also has had facilities in Cape Canaveral, Florida, and it is licensed by that state as an educational institution authorized to grant degrees. Shelton offers courses for which it charges tuition, and purports to award Bachelor degrees in the Arts, Sacred Theology, Christian Education, and Music. It accepts no local, state or federal funds because of the Churches' beliefs respecting the separation of church and state. Shelton has been a party to prior litigation with the Board.[2]

In the summer of 1979 a representative of the Board learned that Shelton intended to offer courses of instruction at Cape May, and to grant degrees through its Florida affiliate. An on-site investigation at Cape May disclosed the presence of students. Since Shelton did not then hold a license from the Board, its representative informed the College's president that it was operating in violation of New Jersey law.

On November 15, 1979 the Board filed in the Superior Court of New Jersey, Chancery Division, a complaint for declaratory and injunctive relief, alleging that Shelton is offering courses of instruction for credit without the requisite license, and seeking a judgment

1. enjoining and restraining the College and its employees, servants and agents from engaging in, assisting in or causing the offering of any courses or classes of instruction, or engaging in any form of educational instruction or offering or providing any credits, awards, certificates or degrees for any such instruction or educational experience which has been given to any enrolled student or other individual in or about Cape May since September 1, 1979, until a license is issued.

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2. *See* Shelton College v. State Bd. of Ed. 48 N.J. 501, 226 A.2d 612 (1967); In re Shelton College, 109 N.J. Super. 488, 263 A.2d 810 (App. Div. 1970). *See* Section III, *infra*.

2. Declaring that any operation of Shelton in New Jersey which has heretofore taken place without a license is unauthorized and contrary to law.

See Verified Complaint for declaratory and injunctive relief of New Jersey State Board of Higher Education, p. 4 (filed in the Superior Court of New Jersey, Chancery Division, Nov. 15, 1979). On the date the complaint was filed, the Superior Court issued a temporary restraining order enjoining all Shelton's educational or instructional activities.[3] The defendants in the Superior Court suit are Shelton's directors, and two of its officers. Neither the Churches, the students, the parents nor any faculty member are parties to that suit.

On November 19, 1979 the plaintiffs filed in the district court an action under 42 U.S.C. §1983, alleging that the efforts of the Board to prevent Shelton's educational and instructional activities unless it complied with New Jersey's licensing scheme violated their rights to the free exercise of religion, unduly entangled the State in the affairs of a religious institution, denied their rights in education to express, transmit and receive ideas, denied their property rights and denied them equal protection of the law. They contended, moreover, that the statute and regulations the Board sought to enforce were unconstitutionally vague. The district court held an evidentiary hearing on plaintiffs' motion for a preliminary injunction, and made findings of fact. Neither side challenges these fact findings on appeal.[4] On the basis of these findings the district court concluded:

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3. A limited exception was provided in the temporary restraining order for students then enrolled, permitting them to attend until the end of the academic semester on December 22, 1979.

4. The district court found, with respect to the parents, the students, and the faculty members at Shelton, that they all shared the same theological beliefs and codes of personal conduct.

> Central to their beliefs is their conviction that the Bible is infallible, inerrant Word of God which provides guidance for ev-

1. that the instant suit was not barred by *res judicata*;
2. that the pendency of the Superior Court action for injunctive relief against Shelton's directors

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NOTE 4 — (*Continued*)

ery phase of life. They believe in the fallen nature of man, that by reason of his sinful nature man cannot (as the "humanist" would contend) achieve his own Utopia or salvation, that man can be saved only by the substitutionary sacrifice of Jesus and the acceptance of that sacrifice by the believer.

For these persons there are no areas of life which are not governed by their Biblical faith, whether it be their personal conduct, their vocations or the subjects they teach. Both the students and the teachers who testified believe that their presence at Shelton College is for the purpose of preparing themselves or others to perform the missions their Lord calls upon them to perform.

Several of these students could have attended recognized secular colleges and universities had they chosen to do so. The teachers work at Shelton College at considerable financial sacrifice to themselves.

When students attend Shelton College, they accept a strict code of conduct embodied in their Student Handbook (Exhibit P-1). This includes dress codes, compulsory chapel four days a week, refraining from studying, swimming, sun bathing and athletics on Sundays, refraining from the possession or use of alcoholic beverages, tobacco, non-medicinal narcotics or hallucinogenic drugs and marijuana, and avoiding modern dance, commercial movies and rock and roll music. There is strict regulation of dating, engagements and marriage.

Every academic subject is taught from a perspective of the religious point of view of the fundamentalist denominations, whether it be history, art, economics, chemistry or English literature. The conduct and beliefs of the Shelton student and the theological doctrines which form the content of the academic program are at total variance from secular and most church-sponsored colleges and universities. This is the reason why the students have selected Shelton College, why the parents wish their students to attend, and why the faculty members teach there. They seek the nurture and fellowship of a community of the faithful, where they can develop their understanding and knowledge of their own faith, and where they can prepare to propagate it in the world at large.

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and two of its officers did not require dismissal of the federal complaint;

3. that a stay of the federal complaint pending resort to the state court for an interpretation of the challenged statute and regulations was inappropriate;
4. that a preliminary injunction should issue, enjoining the Board from taking any action having the effect of preventing Shelton, its employees, servants or agents from engaging in any religious, teaching, or educational activities or from publicizing or advertising such activities, and that the outstanding Superior Court injunction should be modified to permit such activities; and
5. that any further preliminary relief with respect to the Superior Court action should be denied.[5]

An order reflecting these conclusions was entered, and these appeals followed. The Board contends that no preliminary relief should have been granted; indeed that the complaint should have been dismissed. The plaintiffs contend that the relief which was granted inadequately protects their first amendment rights from harm pendente lite, and that the Superior Court proceedings should have been enjoined while the federal court disposed of the entire case.

The order secured by the State Board of Higher Education requires that on December 22, 1979, Shelton College, the core of this community of believers, must cease teaching. By state fiat a religious community will be destroyed.

482 F. Supp. at 974.

5. Specifically, the district court enjoined the Board from enforcing the state court order forbidding teaching and advertising, and prohibiting award of credits toward a Florida degree, but declined to enjoin the Board from enforcing the order prohibiting the grant of New Jersey degrees. Contrary to the suggestion in the concurring opinion, page 4, that the district court enjoined enforcement of the licensing scheme in other respects, in fact no more was enjoined than enforcement of an overbroad temporary injunction.

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II.

The New Jersey Regulatory Scheme

Prior to 1899 the State of New Jersey made no effort to regulate private higher education. In specific instances by special acts of the legislature, however, some institutions were granted charters authorizing the conferring of degrees.[6] An amendment to the New Jersey Constitution in 1875 prohibited the legislature from granting a corporate charter other than by a general law. *See* N. J. Const. Art. IV §7 ¶9. Thereafter educational institutions could only be chartered under general laws such as those dealing with not for profit corporations, and religious societies. *See* N.J.S.A. 15: §1 et seq.; 16: §1 et seq. Since it was no longer lawful to confer degree granting authority by special charter, in 1897 a statute was passed authorizing any seminary or school of theology, whether founded under a general act of the legislature or by an old special charter, to confer designated degrees. P.L. 1897, C. 27, §1, p. 42; N.J.S.A. 18A:68-2. Two years later a statute authorized any college founded under any general act of the legislature to "give diplomas and confer degrees upon those who shall successfully complete prescribed courses of study, and confer honorary degrees upon such others as shall be recommended thereafter by its board of trustees." P.L. 1899, C. 116, §1, p. 168; N.J.S.A. 18A:68-1.[7] No license requirement or

6. Centenary College for Women, L. 1867, C. 103, p. 172; Seton Hall University, L. 1861, C. 86, p. 198; St. Michael's Monastery, L. 1866, C. 319, p. 753; Drew University, L. 1868, C. 2, p. 4; Stevens Institute of Technology, L. 1870, C. 52, p. 166; St. Peter's College, L. 1872, C. 487, p. 1117. These six chartered degree-granting institutions, of which five were religiously affiliated, joined Rutgers, the State University (formerly Queen's College) and Princeton University, (formerly the College of New Jersey) both of which, also originally religiously affiliated, held Royal charters authorizing the granting of degrees.

7. The 1899 statute expressly negated authority for a college to confer degrees or diplomas authorizing the practice of medicine, dentistry, or law.

other form of state regulation accompanied these general authorizations.

In 1912, in the gubernatorial administration of Woodrow Wilson, a former president of Princeton University, New Jersey for the first time adopted legislation prescribing the terms and conditions under which degrees could be conferred, and prohibiting the conferring of a degree "until the terms and conditions of such degree . . . shall first be submitted to and approved by the State Board of Education." P.L. 1912, C. 315. This legislation exempted from the license and course approval requirements the specially chartered institutions listed in footnote 5, both religiously affiliated and secular, and New Jersey still considers them exempt. N.J.S.A. 18A:68-6; N.J.A.C. 9:1-2.15. Institutions founded under any general act, including religiously affiliated institutions such as Shelton, were covered by the 1912 law, and by a 1916 statute, P.L. C. 152, §1, p. 308, which superseded it. Section 1 of the 1916 law, found now at N.J.S.A. 18A:68-3, provides:

> No corporation shall furnish instruction or learning in the arts, sciences, or professions for the purpose of admitting any person to the grade of a degree, or shall confer or participate in conferring a degree, giving to any person a diploma of graduation or of proficiency in a course of study, in learning, or in scientific arts or methods, within this state, until it shall have filed a certified copy of its certificate of incorporation with the board of higher education and obtained for such board a license to carry on the business under such rules as the board of higher education may prescribe.

Section 2 of the same law prohibits the corporation and any of its members or officers from admitting any person to the grade of a degree "without first submitting the basis or conditions thereof to the board of higher education, and obtaining its approval thereof, and of the prac-

tice of conferring and bestowing such degrees." N.J.S.A. 18A:68-6. The 1916 law authorizes the Attorney General of New Jersey to seek from the Superior Court an order restraining any corporation from "carrying on the business of such instruction or teaching, or conferring any such degree, or giving any such diploma without such license." N.J.S.A. 68-5. The same section permits the Superior court to proceed "in a summary manner or otherwise." Monetary penalties, assessable against the corporation, its members or officials in a summary proceeding, and the nonpayment of which results in a 90 day civil commitment to a county jail, sanction the license and approval requirements. P.L. 1916, C. 152, §4 p. 310; N.J.S.A. 18A:68-9, 10.

The 1916 law contains no exemption for Board approval of courses whose content is religious, or for diplomas or degrees in theological subjects. Nor does it contain any standards to guide the Board in approving "the basis or conditions" of a degree "in recognition of the attainment or (sic) proficiency of any person in pursuing or graduating from any course or courses of study, arts, or learning." N.J.S.A. 18A:68-6. The Board has, however, adopted extensive regulations for those New Jersey institutions subject to its licensure and approval jurisdiction. N.J.A.C. 9:1-1.1 - 9:1-6.4. Application for a license requires submission of a detailed questionnaire and supporting documents. The prescribed form of questionnaire, found in Appendix C to title 9 of the New Jersey Administrative Code, p. 36.4 et seq., is attached to this opinion as Appendix 1.

For institutions accredited by the Middle States Association, a private accrediting organization, the Board ordinarily accepts such accreditation as sufficient for licensure and approval. N.J.A.C. 9:1-2.1. For institutions not approved by the Middle States Association, the Board has established a Licensing Approval Advisory Board. N.J.A.C. 9:1-2.3-8. The Licensing Approval Advisory

Board recommends policies for licensure and degree approval for institutions not regionally accredited, recommends approval or disapproval of petitions for licensure, and reviews proposed license revocations. N.J.A.C. 9:1-2.7. Presumably the Advisory board's recommendations are made consistent with the Board's regulations. These govern an institution's statement of purpose, N.J.A.C. 9:1-1.2; organization and administration, N.J.A.C. 9:1-1.3; finances, N.J.A.C. 9:1-1.4; educational programs, N.J.A.C. 9:1-1.5; faculty, N.J.A.C 9:1-1.7; library, N.J.A.C. 9:1-1.8; students and student services, N.J.A.C. 9:1-1.9, physical facilities, N.J.A.C. 9:1-1.10; and official publications, N.J.A.C. 9:1.1.11. The regulations are, in a word, pervasive. Of particular relevance to religiously affiliated institutions is the regulation dealing with statement of purpose:

> (a) Regulations concerning statement of purpose are:
>
> 1. Each institution shall maintain appropriate and operationally effective statements of purpose (such as those found in the college catalog and other official documents) and shall review these statements for possible revision and improvement at periodic intervals not to exceed five years;
>
> 2. Copies of statements of purpose shall be promptly filed with the chancellor and, when required by the Department of Higher Education, implementation schedules shall be similarly filed.
>
> (b) Standards concerning statement of purposes are:
>
> 1. Statements of institutional purpose should define the educational climate to be established, the nature of the education students are expected to have upon graduation, the occupational and other outcome expected from

the programs, and the aspects of individual growth to be enriched or developed;

2. Each institution should be prepared to present evidence that the various elements of institutional life (faculty work, educational program, student life, finances, physical plant, organization and administration) are structured to support the purposes stated;

3. Each institution should develop a long-range plan to implement its goals, including a written schedule of priorities, resource allocations and responsibility assignments, with target dates for the realization of specific objectives;

4. Purposes and plans should be developed and periodically reviewed by a committee drawn from appropriately concerned institutional constituencies, and should be available for distribution to all constituent groups.

N.J.A.C. 9:1-1.2.

The requirement of a statement of purpose is not merely informational, for the regulation dealing with educational programs provides that "[t]he educational program shall reflect and support the purposes of the institution" and "shall include course work and other activities extending over a sufficient period of time and in sufficient intensity to fulfill the purposes of the institution." N.J.A.C 9:1-1.5(a)1, 2. Thus on the face of the regulations it would appear that in order to obtain a license, an institution with a religious commitment such as Shelton's must submit to the Board a statement of its religious purpose, as well as evidence that the various elements of its institutional life are structured to support that purpose, and must submit to the Board's judgment the question whether its educational program reflects and supports that purpose. Facially, therefore, the

Board's licensing regulations suggest a very high degree of state entanglement in Shelton's religious affairs. And the 1916 law unambiguously prohibits instruction leading to a diploma or degree, even in theology, absent a license.[8]

III.

Prior Litigation

At one time Shelton had a New Jersey license. Under the 1916 Act the Board may revoke a license, N.J.S.A. 18A:68-4, and in 1966 it instituted a revocation proceeding.[9] When the Board entered an order limiting Shelton's authority to grant a bachelor of arts degree to June 30, 1967, the college sought review of the agency's decision in the Superior Court, Appellate Division. *See* N.J.R. 2:2-3(a)(2). The Supreme Court of New Jersey certified the case before argument in the Appellate Division, reviewed the abbreviated record made before the agency,[10] and considered Shelton's legal challenges to

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8 *Cf.* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502-03 (1979) (NLRB jurisdiction over alleged unfair labor practices in Catholic religious schools would result in impermissible entanglement, for the Board's resolution of unfair labor practices charges "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." Moreover, NLRB determination of the "terms and conditions of employment" would enmesh the Board in "nearly everything that goes on in the schools.").

9. The reasons for the proposed revocation do not appear in this record or in any reported New Jersey opinion.

10. Chief Justice Weintraub described that record as follows:

> The record consists only of the notice of appeal and the resolutions already mentioned. The first resolution, dated December 13, 1965, recites the following: that on June 2, 1965 the State Board of Education resolved not to grant approval to Shelton of its practice of conferring degrees; that a hearing begun on July 21, 1965 was interrupted by legal action initiated by Shelton with the result that the school year 1965-66 got under way; that upon request Shelton submitted a statement of its

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the 1916 law. In this agency review proceeding Shelton adduced no proof, but contended that the 1916 law was unconstitutional:

1. because any effort by the state to regulate in any way the award of a bachelor's degree violated the free speech guaranty of the first amendment;
2. because the statute sets forth no standard for the exercise of delegated legislative power, and thus violates Art. IV §1 ¶1 of the New Jersey Constitution;
3. because the grandfather clause exempting the chartered institutions listed in footnote 5 creates an unconstitutional classification; and
4. because the Board lacked statutory power to grant conditional approvals.

No free exercise clause or entanglement claims were made or considered. The Supreme Court rejected the four claims Shelton did present. Following that court's decision, further revocation proceedings took place be-

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NOTE 10 — *(Continued)*

current condition; that a further investigation revealed compliance with some of the standards which theretofore had not been met; that a question continues as to compliance with other standards described in the resolution; but nonetheless in the interest of the students then enrolled and in the light of the problems attendant upon a disruption of the college in midyear, approval was given of the practice of conferring the degree of bachelor of arts, such approval to continue to September 15, 1966. As we have already noted, the State Board of Education adopted a further resolution (dated June 27, 1966) which, after reciting a later annual evaluation of the college and the Board's finding that certain specified standards had not yet been met, nonetheless concludes the authority to bestow the degree of bachelor of arts should be extended until June 30, 1967 upon, however, 12 stated conditions to be met by Shelton not later than May 1, 1967.

48 N.J. at 505-06; 226 A.2d at 614-15. The record in this case does not disclose what were the 12 stated conditions for licensure.

fore the Board, and ultimately Shelton lost its license.[11] So far as this record discloses, no free exercise clause or entanglement claims were made or considered at any time in the Board's revocation proceedings. Nor is there any indication that any of the previous New Jersey agency or court litigation dealt with teaching rather than degree granting.

The Board contends that the doctrines of res judicata or collateral estoppel preclude preliminary injunctive relief, and require dismissal of the complaint. The district court rejected this contention. 482 F.Supp. at 975-76. We agree. The federal courts are referred, for the claim and issue preclusion effect of a state court judgment, at least initially, to the law of the rendering state. 28 U.S.C. §1738. New Jersey requires, for the application of *res judicata*, identity of causes of action, of parties or their privies, and of issues. *E.g., Brick Tp. Ocean County v. Vannell*, 55 N.J. Super. 583, 590, 151 A.2d 404, 408 (App. Div. 1959) (Haneman, J.). In the license revocation proceedings only Shelton was a party. There has been no showing that for purposes of the free exercise and establishment claims Shelton was a privy for the Churches, parents, students, and faculty member presently before us. Moreover, even as to Shelton there has been no showing that the license revocation proceeding involved in any way the religion clause issues urged in this Section 1983 action. Clearly a New Jersey court would not hold that the complaint before us is barred by *res judicata*. Indeed if it were to do so with respect to the claims of the Churches, parents, students and faculty member, such a holding would violate the due process clause of the fourteenth amendment. *Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 327 n.7

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11. Only a procedural aspect of the revocation proceedings was reviewed by the New Jersey Courts. In re Shelton College, 109 N.J. Super. 488, 263 A.2d 810 (App. Div. 1970).

(1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard"); *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 329 (1971); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

As to collateral estoppel, that doctrine in New Jersey precludes relitigation only of questions "distinctly put in issue" and "directly determined" adversely to the party against which the estoppel is asserted. *City of Plainfield v. Public Service Gas and Electric*, 82 N.J. 245, 257-58, 412 A.2d 759, 765-66 (1980). Moreover, under the New Jersey rule, if the judgment is based on one or more of several grounds, but does not expressly rely on any of them, none is conclusively established, since a subsequent court cannot tell what issue or issues were in fact fully adjudicated. *Ettin v. Ava Truck Leasing, Inc.*, 53 N.J. 463, 480-81, 251 A.2d 278, 287 (1969) (Jacobs, J.), overruling *Kelley v. Curtiss*, 16 N.J. 265, 108 A.2d 431 (1954) (Brennan, J.). *Cf. Boykins v. Ambridge Area School Dist.*, 621 F.2d 75 (3d Cir. 1980) (no preclusive effect accorded decision of state agency when impossible to tell what it decided). Here it is clear from the two judicial opinions in Shelton's prior litigation with the Board that no religion clause claims were considered or determined.

The Board has not made any showing as to what, finally, was litigated at the agency revocation proceedings which were not judicially reviewed. Whether New Jersey would apply principles of judgment preclusion — either res judicata or collateral estoppel — to those proceedings is a decidedly open question, depending on an analysis of the Board's statutory authority to perform an adjudicative as distinguished from a policy making function. *See Lubliner v. Bd. of Alcoholic Bev. Co., Paterson*,

33 N.J. 428, 165 A.2d 163 (1960).[12] For two reasons, however, we need not speculate whether New Jersey would treat the Board's license revocation proceeding as adjudicative or policy making. First, "[r]es judicata and collateral estoppel are affirmative defenses that must be pleaded." *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 350 (1971); Fed. R. Civ. P. 8(c). The Board did not, in opposing the grant of a preliminary injunction, establish that it adjudicated the religion clause claims presented in this case, or even that it had statutory jurisdiction to consider them. It simply failed to meet the burden Rule 8(c) imposes.[13] Second, the Supreme Court has held that neither 28 U.S.C. §1738 nor federal common law principles of res judicata require deference to administrative as distinct from judicial proceedings, *Prentis v. Atlantic Coal Line Co.*, 211 U.S. 210, 226-28 (1908); *FTC v. Texaco, Inc.*, 555 F.2d 862, 894 (D.C. Cir.) (en banc), *cert. denied* 431 U.S. 974 (1977).[14]

We conclude, therefore, that the district court did not err in rejecting the Board's contention that the prior litigation referred to precluded the grant of a preliminary injunction protecting the plaintiffs from violations of the religion clauses of the first amendment. See New Jersey *Education Ass'n v. Burke*, 579 F.2d 764 (3d Cir. 1978); *cf. Wooley v. Maynard*, 430 U.S. 705 (1977).[15]

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12. New Jersey does accord res judicata and collateral estoppel effect to decisions of administrative *tribunals*, City of Hackensack v. Winner, 82 N.J. 1, 410 A.2d 1146 (1980).

13. *See* New Jersey Education Ass'n v. Burke, 579 F.2d 764, 775-76 (3d Cir. 1978), "res judicata is an affirmative defense, dependent on the factual issue of what submissions were actually made to the state court."

14. Moreover, litigants need not exhaust those remedies before seeking relief under Section 1983. Moore v. City of East Cleveland, 431 U.S. 494, 497 n.5 (1977); Ellis v. Dyson, 421 U.S. 426, 432 (1975); McNeese v. Board of Educ., 373 U.S. 668 (1963).

15. The Supreme Court's recent decision in Allen v. McCurry, 49 U.S.L.W. 4015 (Dec. 9, 1980), does not warrant a different con-

IV.

Younger Dismissal

Although it has not abandoned its judgment preclusion argument, the Board on appeal relies chiefly on the contention that principles of equity, comity and federalism required that the federal court stay its hand so that the religion clause contentions be litigated first in the Superior Court of New Jersey. It relies on the spawn of *Younger v. Harris*, 401 U.S. 37 (1971), to assert that because the Board filed its Superior Court action against Shelton's directors and two of its officers first, the federal complaint of all the plaintiffs, whether or not they were defendants in the state court action, must be dismissed. The district court rejected that broad proposition; rightly so, we hold.

We note at the outset that for the Churches, parents, students and teacher, the governing precedents are *Steffel v. Thompson*, 415 U.S. 452 (1974) (declaratory relief) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (preliminary injunctive relief). These plaintiffs are not parties to any state court proceeding. Like the plaintiff in *Steffel*, they were confronted, from the commencement of the state's lawsuit against someone else, with a real threat of harm to them. Each of these plaintiffs has asserted individual first and fourteenth amendment rights distinct from those Shelton, its directors and its officers assert. See Verified Complaint, pp. 3-4; 7-9; 13-15. Specifically, the Churches maintain that the

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NOTE 15 — *(Continued)*
clusion here. That decision affirmed the application of 28 U.S.C. §1738 to litigation under 42 U.S.C. §1983, but also stressed that the full faith and credit statute required that the federal plaintiff have fully and fairly litigated the same issues in state court. Because the prior New Jersey proceedings did not address Shelton's religion clause contentions, neither §1738, nor the Supreme Court's *McCurry* discussion would attribute preclusive effect to the earlier New Jersey proceedings.

Board's enforcement of the regulations deprives them of their first and fourteenth amendment rights to minister to young adults through Shelton College; the students argue that enforcement deprives them of their first and fourteenth amendment rights to receive a christian education; the parents assert enforcement deprives them of their first and fourteenth amendment rights to guide their children's choice of post-secondary education; the teacher claims enforcement deprives him of his first and fourteenth amendment rights to "pursue his religious ministry and Christian apostolate." These rights, with the possible exception of the Churches' rights (the Churches characterize Shelton as an "agency" of the Bible Presbyterian Church), are all distinct from the college's right to exist as a religious-educational institution.[16]

The Supreme Court has held that the "opportunities of pupils to acquire knowledge," is a first amendment right distinct from the right to impart knowledge. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). Moreover, the Court has recently emphasized that the distinct "first amendment right 'to receive information and ideas'. . . . is nowhere more vital than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). Even if one concludes that the Churches, teacher, and parents have no independently assertable rights, Supreme Court precedent clearly indicates that the students have distinct rights which may be enforced in a separate federal action.

An objection might be made that despite their assertion of independent rights, all of these plaintiffs are too interrelated with Shelton College to permit a separate federal court action. The Supreme Court's articulation of

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16. Hence, it is clear that the suggestion in the concurring opinion that the nonparties are in effect suing only on behalf of Shelton College, *see* concurring op. at 16 n.13, finds no foundation in the record.

the contours of derivative preclusion in *Younger* cases, however, has been limited to preclusion of an employer's federal suit when its employees assert identical interests in state court, *Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975), and to preclusion of federal plaintiffs too intertwined with the state defendants "in terms of ownership, control and management," *Doran v. Salem Inn*, 422 U.S. at 929. Clearly, a majority of the Court has formulated derivative preclusion only in terms of an identity of economic activities and interests. Certainly, the parents and students in this action neither own, nor control, nor manage Shelton College. Arguably, the teacher, as a Shelton College employee, might be barred under *Hicks*. The relevance of *Hicks*, however, is merely superficial. The employer in *Hicks* was derivatively precluded because any claim his employees could make in state court regarding their first amendment right to participate in the screening of *Deep Throat* derived from their status as agents asserting the employer's right to show the film. Here, the teacher asserts an individual first amendment right to teach a particular theology. That right is distinct from Shelton's right, as a school, to propagate its doctrine. Arguably, the Churches might be precluded under an ownership, management and control theory. But while Shelton College is the teaching arm of the Bible Presbyterian Church, the Board has not shown to what extent the two Churches in this suit in fact manage and control the college, and the state court action is against the separate directors and officers of the college.[17]

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17. Chief Justice Burger's concurrence in Allee v. Medrano, 416 U.S. 802, 830-31 (1974), would also extend the derivative preclusion principle to an organization seeking to assert in federal court the interests of members prosecuted in state court. A majority of the Court has yet to adopt an organizational preclusion theory. Even if that theory represents the direction toward which the Court is inclined, it is of no relevance to the students, teacher, and parents here, for the Chief Justice did not contend that individual members of an organization could not assert their own interests in federal

The concurrence purports to rely not on an interrelationship analysis to preclude the nonparties' action, but on a theory that derivative preclusion is warranted here because the nature of the relief the district court awarded in this case differs markedly from the relief in *Steffel* and *Doran*. Although those cases arose out of nearly identical fact situations and presented identical legal issues to the state and federal tribunals, the concurrence notes that the federal courts were not asked to interfere in the pending state proceedings. It urges that in this case, however, the federal court is requested to enjoin the enforcement of the state court's preliminary injunction. Unlike *Steffel* and *Doran*, therefore, this case involves *direct* federal interference in an ongoing state enforcement proceeding. If the *Younger* doctrine forbids anything, the concurrence contends, it prohibits any direct federal court interference with any state enforcement proceeding.[18] This "direct interference" the-

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court when the organization was the subject of a pending state enforcement proceeding. Such an assertion would in this case reduce to an untenable proposition that if a church might assert its congregation's interests in state court, no individual member of the flock may be heard in federal court to press the tenets of his or her own faith.

Nor does the Chief Justice's concurrence stand for the proposition that an individual federal plaintiff who is a member of an organization to which the individual state defendant also belongs may not sue in federal court. In *Steffel*, both the state defendant and the federal plaintiff were leafletting for the Atlanta Mobilization Committee [Against the War in Vietnam]. The Court never suggested that affiliation with that organization would preclude the federal plaintiff's suit.

18. The cases which the concurring opinion cites, however, are all interrelationship decisions. In addition to *Hicks* and *Allee*, the lower court decisions on which the concurrence relies, none of them from this circuit, also make a "nexus" analysis. In ACLU v. Bozardt, 539 F.2d 340 (4th Cir.), *cert. denied*, 429 U.S. 1022 (1976), an ACLU member attorney faced state disciplinary proceedings. The Fourth Circuit observed the ACLU might have standing to assert the separate associational interests of its other member at-

ory, while initially appealing, does not withstand analysis. First, the district court did not directly — or indirectly — interfere in the state court *proceedings*. The district court restrained the *Board* from availing itself of a portion of the preliminary relief the state court granted. The district court's ruling in no way hindered the state

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NOTE 18 — (*Continued*)

torneys, but held the ACLU's action barred under *Younger* on some rather unarticulated ground that allowing an organization to attack the same state law at issue in the state proceeding, with the possible result that the state defendant ACLU member might benefit by the federal court's action, would be an impermissible and end-run around *Younger*. This discussion is confined to one rather conclusory paragraph.

In Doe v. Maher, 414 F. Supp. 1368 (D. Conn. 1976) (3-judge court), *vacated on other grounds*, 432 U.S. 526 (1977), the District of Connecticut explicitly allowed the federal plaintiff to assert her *individual* interests, but forbade her to represent a *class* that included the state defendants.

In Corpus Christi People's Baptist Church v. Texas Dep't. of Human Resources, 481 F. Supp. 1101 (S.D. Tex. 1979), *aff'd mem.* 621 F.2d 438 (5th Cir. 1980), the Southern District of Texas deemed the federal-only plaintiffs "mere appendages" of the state defendants. The court held they asserted no interests distinct from the state defendant's claims. A clearer "nexus" holding cannot be found.

Thus, the concurring opinion's cases have nothing to do with the direct interference theory it advances, although they do support the "nexus" ground on which it declines to rely as the primary ground of preclusion. Moreover, the concurrence reveals a further inconsistency. In Footnote 13, it asserts that had the federal-only plaintiffs in this case advanced an interest distinct from the state defendants', this case would be consistent with *Steffel* and *Doran*. This proposition contradicts the prior discussion in two ways. First, the concurrence's assumption that the nonparty federal plaintiffs have no distinct interests is in fact a conclusion that the plaintiffs and the state defendants are too interrelated. Second, the conclusion that a separate interest would make this case analogous to *Steffel* and *Doran* contradicts the initial premise that these cases bar *direct* interference with state enforcement proceedings. The assertion of a separate interest does not alter the requested relief of an injunction against enforcement of the state preliminary injunction.

court from ruling on the merits of the Board's claims or of Shelton's constitutional challenges. *Cf.* discussion *infra* Part V. pp. 33-35. Even assuming, arguendo, the district court's limited ruling had been a "direct interference", a theory proposing that any direct interference violates *Younger* still proves inadequate. Had the nonparty plaintiffs in this action sought merely a declaratory judgment invalidating the Board's regulations, rather than an injunction limiting the scope of the state court injunction, there would be no *direct* interference in the state court proceeding, and this case would look very much like *Steffel v. Thompson*. These plaintiffs did in fact seek such a declaratory judgment (in addition to injunctive relief), but the federal district court, in deference to state court adjudication of the merits of the regulations, declined to intrude so far into the substance of the state court controversy.

Rather, it awarded the more limited relief of an injunction restraining enforcement of part of the state court preliminary injunction. The course which the district court declined to take, and of which the concurrence would apparently approve — invalidating the regulations — would have been far more intrusive to the state enforcement scheme, although it would not have impinged *directly* on the state court's adjudication. As the Supreme Court has recognized, the collateral intrusion of a declaratory judgment invalidating the contested state law is just as disruptive to state enforcement as direct interference in the state proceeding in the form of an injunction. *See Samuels v. Mackell*, 401 U.S. 66 (1971).

Moreover, the Supreme Court has declined to draw a direct interference/collateral intrusion line in *Younger* cases. In *Doran v. Salem Inn*, the nonparty plaintiffs did not seek directly to intrude on the state prosecution of M & L Bar. They sought an injunction against enforcement of the topless bar ordinance. The Supreme Court

held there might be cases in which nonparty plaintiffs might be precluded from bringing a federal action, not because those plaintiffs were seeking directly to intrude in the pending state action, but because they might be so interrelated "in terms of ownership, control, and management," that pursuit of a separate federal action would undermine *Younger*. As *Doran* makes clear, the real problem is not the relief sought in federal court, but the relationship of the nonparty federal plaintiffs to the state defendants.[19] As has been shown, the nonparties here do not fall within the *Hicks-Doran* "nexus" with the state defendants.

A final derivative preclusion theory, implicit in the concurring opinion, is that the nonparties' distinct federal claims should be barred if the outcome of the state enforcement proceeding would in a practical sense be dispositive of their interests. This argument is, in effect, a variant of the interrelationship theory. The decision

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19. There is a further difficulty with the concurrence's direct interference argument. A federal plaintiff not the subject of a pending state enforcement proceeding cannot avoid interfering in some way with some pending state proceeding if he seeks to declare the underlying statute invalid, or to enjoin the state official from enforcing that statute. Unless there is some pending enforcement proceeding against someone, the unrelated federal plaintiff may be dismissed on the ground that his suit is not ripe, or that he lacks standing. See Chief Justice Burger's concurrence in *Allee v. Medrano*, *supra*. Because it is clear that "collateral" federal interference is no less intrusive than direct interference in the workings of the state court, the concurrence must be read to preclude nonparty federal plaintiffs from initiating any federal declaratory or injunctive action. This proposition, however, has been squarely rejected by this Circuit in *New Jersey Education Assn v. Burke*, 579 F.2d 764, 770 (3d Cir. 1978). There, Judge Adams, writing for a unanimous panel, stated "the extreme of the extension [of the *Younger* doctrine] would be an assertion that *Younger* precludes jurisdiction whenever any state proceeding is pending." The court declined to make such an extension. The concurrence, apparently, if inadvertently, would have the panel make that extension now.

advancing it on which the concurrence relies is *Corpus Christi People's Baptist Church v. Texas Dep't. of Human Resources*, 481 F. Supp. 1101 (S.D. Tex. 1977), *aff'd mem.* 671 F.2d 438 (5th Cir. 1980). That case involved a state enforcement proceeding against an unlicensed church-operated child care home. The court held the nonparty parents and children barred from asserting a federal claim in federal court. Holding rights of the nonparties "merely appendages" to the church's rights, the court assumed that the parents and children who made use of the church-operated child-care home had no interests distinct from the state-defendant church's. Rather than considering whether those federal plaintiffs might not have a separate interest in religiously-oriented child care, the court concluded there could be no such interest because if the church won in state court, the federal plaintiffs' rights would be vindicated, and if the church lost, the federal plaintiffs would have no interest left because the home would have gone out of business.[20] A nexus finding on the ground that if the state defendant prevails, the federal plaintiff's interests would be vindicated proves too much. In *Steffel* and *Doran*, had the state defendants obtained rulings invalidating the local laws, the federal plaintiffs would have been vindicated. Indeed, no matter how unrelated the federal plaintiff, so long as some state

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20. The district court cited two district court decisions, Marsico v. Elrod, 469 F. Supp. 825 (N.D. Ill. 1979), and Hjelle v. Brooks, 424 F. Supp. 595 (D. Alaska 1976). Those cases, however, involved paradigm *Hicks-Doran* preclusion situations. In *Marsico*, an adult theater projectionist was barred from federal court when his employer was a state court defendant. In *Hjelle*, the court applied *Doran's* management and control formula to bar the federal suit of a group of fishermen operating under the same management and control as a group of fishermen subject to a pending state proceeding. Neither decision offers an analysis upholding preclusion on the theory that the outcome of the state proceeding would affect the rights of the federal plaintiffs.

defendant might successfully challenge the same state law, the federal plaintiff's rights would be vindicated. That does not mean that a federal plaintiff may not bring an action so long as some state proceeding addressing the same constitutional issue is pending. This circuit in *New Jersey Education Ass'n v. Burke*, 579 F.2d 764, 770 (3d Cir. 1978), has squarely rejected that proposition. Similarly, a state defendant's failure in state court may often defeat an unrelated federal plaintiff's interests. If, for example, a state court is requested to enforce a local criminal obscenity law against a pornographic publication, and grant of that relief would mean the publication would cease distribution in that area, it is inconceivable that a federal court would hold a reader barred from asserting his first amendment interest in reading the magazine on the ground that should the magazine lose in state court, his interests would be resolved because there would be nothing left to read.[21] Absurd as such a holding sounds, it is in essence the conclusion of the *Corpus Christi* court. We decline to rely on such a precedent.

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21. It should be noted that this hypothetical plaintiff would not be suing on the publication's behalf, nor would he be asserting a broad scale injury to an undifferentiated public interest. Rather, as a plaintiff maintaining a specific relationship of readership with the publication, this plaintiff would have standing to challenge the infringement of his individual first amendment rights to read and to receive information under Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (ban on drug price information held to violate first amendment rights of consumers to receive information), and Lamont v. Postmaster General, 381 U.S. 301 (1965) (recipient of communist literature mailed from overseas challenged statute requiring the post office to detain "communist propaganda"). Indeed, although the majority opinion assumed there was standing, Judge Brennan's *Lamont* concurrence drew a careful distinction between a reader's standing to assert a publication's interests, and a reader's standing to assert his individual interest. In the latter case, there clearly was standing, for

It is clear, then, under *Steffel* and *Doran*, that nonparties to the state enforcement proceedings who assert independent constitutional interests may advance those interests in a separate federal action. Since the interests of any of these plaintiffs alone are sufficient to justify the court's consideration of the application for a preliminary injunction, that order cannot be reversed on the chief ground the Board advances, absent a very great extension of the *Younger* rule, which would, in effect, ignore the teachings of *Steffel* and *Doran*.[22]

> the First Amendment 'necessarily protects the right to receive [the material].' . . . [T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

381 U.S. at 308 (Brennan, J., concurring) (citations omitted). *See also* Kleindienst v. Mandel, 408 U.S. 753, 762-65, discussed *supra* at p. 18.

22. Shelton contends that it, too, is an appropriate federal plaintiff. The Board urges that although the defendants in the section 18A:68-5 proceeding are Shelton's Board of Directors and two of its officers, Shelton is for all practical purposes a party to that state court suit. Shelton does not dispute its party status, but urges that a *Younger* dismissal would be improper in the circumstances of this case. *See* Younger v. Harris, 401 U.S. at 46, 54 (irreparable harm exception). The possibility that a section 18A:68-5 case will be handled summarily, and the absence of any but discretionary appellate review of pendente lite orders cast some doubt on the adequacy of the opportunity to litigate Shelton's federal claims in the State Court. *See* Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (Younger dismissal improper if federal plaintiffs would have no "opportunity to raise and have timely litigated by a competent state tribunal the federal issues involved"). These issues need not be addressed in disposing of the Board's appeal from the order granting a preliminary injunction. That order did not dismiss Shelton as a plaintiff. But its plaintiff status neither adds to nor subtracts from the standing of the remaining plaintiffs to seek pendente lite relief. If they were proper plaintiffs, and they were, it was proper to proceed with the federal court hearing. Contrary to the suggestion of the concurring opinion, at 11, we do not hold that Shelton can come under any nonparty/nonpreclusion exception to the *Younger* doctrine.

The Board urges we disregard the impeding Supreme Court precedent, and make the requested extension by requiring that the Churches, parents, students and teacher intervene in any pending state proceeding in order to litigate their own separate rights. There are several serious obstacles to the adoption of such a rule. First and most obviously, as recently as *Wooley v. Maynard*, 430 U.S. 705, 710 (1977), Chief Justice Burger, writing for the Court, reaffirmed the holdings of *Steffel* and *Doran:* that a federal forum is available to litigants threatened with violations of federally protected rights and not presently parties to a state court proceeding.

Second, the Board's brief refers us to no New Jersey law, and our own research has disclosed none, suggesting that non-parties could intervene of right in the New Jersey action. The Supreme Court has repeatedly asserted that a primary motivation in its adoption of the *Younger* doctrine was the insulation of state enforcement of its criminal law from litigious interruptions. *See, e.g., Kugler v. Helfant*, 421 U.S. 117, 129-31 (1975); *Younger v. Harris*, 401 U.S. at 43-44. Even when the doctrine was extended to certain civil cases, that step was justified because of the close relationship of those cases to state penal policies. *See, e.g., Moore v. Sims*, 442 U.S. 415, 423 (1979); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977); *Huffman v. Pursue, Ltd.*, 421 U.S. 592, 604 (1975). Certainly neither New Jersey nor any other state would permit third parties to intervene and participate in criminal prosecutions. One obvious reason for the *Steffel-Doran* qualifications of the *Younger* doctrine is the recognition that a pending prosecution against someone else affords no opportunity for non-parties to assert their own first amendment rights, because the state will not permit them to participate in the defense of penal charges against others. The licensing scheme of the 1916 Act does not provide for enforcement by indictment, but it does embody a strong state penal policy; so

strong, indeed, that the normal due process protections of indictment and trial by jury have been eliminated in favor of civil penalties enforceable in a summary proceeding and by civil incarceration, N.J.S.A. 18A:68-9, 10, and by a summary proceeding restraining violations. N.J.S.A. 18A:68-5. When the district court acted on the application for a preliminary injunction, the Board tendered to it no authority suggesting that intervention by the parents, the students and the faculty member would be any more welcome in the pending proceeding under Section 18A:68-5 than in a criminal prosecution. Nor has any such authority been suggested to us.[23]

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23. With the benefit of hindsight, we know that although a broad temporary restraining order was issued at the outset of the state court Section 18A:68-5 proceeding, that proceeding was thereafter anything but summary, at least in the temporal sense. The opinion of the Superior Court, Chancery Division was filed on November 7, 1980. In a section of the opinion bemoaning the action of the district court, its author refers to the possibility of "remitting the federal plaintiffs to their remedies in the pending state suit," but nowhere identifies what those remedies would be for non-parties. The New Jersey State Board of Education et al v. The Board of Directors of Shelton College et al. Slip op. at 9 (N.J. Superior Ct. Ch. Div. C. 1088-79E). When the district court acted there was no way of telling that the Section 18A:68-5 proceeding would be conducted other than summarily.

Although the defendants in the state proceeding could, under Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923), assert as a defense the constitutional interests of the nonparty parents and students, the Supreme Court has never suggested those nonparties would therefore be precluded from instituting their own action, and would be obliged to rely for their sole remedy on the disposition of the action against the school. *Cf.* note 17 *supra*.

We further note that no decision in the Supreme Court's *Younger* line has concerned interposition of additional *parties* to a pending state enforcement action. The Court has instead focused on whether state procedural law impeded the state defendant's ability to raise additional, federal, *claims* in the state proceeding. *See, e.g.*, Moore v. Sims, 442 U.S. at 425-26 & n.9; Quern v. Hernandez, 405 F. Supp. 757 (N.D. Ill. 1978), *summarily aff'd*, 440 U.S. 951 (1979).

The reality confronting the district court, when it acted on the application for a preliminary injunction, was that the Churches, parents, students, and faculty member could protect their first amendment rights only by a separate action somewhere: either in the district court or in a separate action in a New Jersey court. Had they resorted to a separate action in a New Jersey court, that court would have been required to enforce the same Section 1983 cause of action which they have pleaded in the federal court. *Testa v. Katt*, 330 U.S. 386 (1947). That cause of action includes the right to be protected, pendente lite, from unlawful restraints upon and unlawful state entanglements in their free exercise of religion. Assuming that their claims for such pendente lite relief were meritorious, a state court, applying federal law, would be obliged to grant them the same relief against the pending Section 18A:68-5 action as would a federal district court. If it did, the interference with the penal policy of New Jersey embodied in the 1916 law would differ from the same relief granted by a federal tribunal only in some Pickwickian sense. It is the federal law which binds both tribunals, not the address of the court house, that interferes with the state's penal policy. Assuming that both tribunals would be receptive to claims of pendente lite protection of first amendment rights (and on this score the Attorney General's brief reassures us) then the defendant Board, charged with enforcement of the state's penal policy would appear to have no

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NOTE 23 — (*Continued*)

The concurring opinion argues that the nonparties could have intervened under N.J.R. 4:33-1 (intervention of right) or N.J.R. 4:33-2 (permissive intervention). These rules and the cases which the concurrence cites, however, concern ordinary civil actions, not quasi-criminal enforcement proceedings. As the rationale for the extension of *Younger* to civil enforcement proceedings establishes, these actions are inherently different from ordinary civil cases; hence the need to insulate them from interference.

substantive interest adversely affected by the parents', students' and teacher's choice of a forum.[24]

From the viewpoint of these plaintiffs, who are not parties to the section 18A:68-5 proceeding, however, the choice of a forum is significant. Congress has in 28 U.S.C. §1343(3) given them that choice, for "*Younger* principles aside, a litigant is entitled to resort to a federal forum in seeking redress under 42 U.S.C. §1983 for an alleged deprivation of federal rights." *Wooley v. Maynard*, 430 U.S. at 710. One important practical reason for the exercise of that choice in favor of a federal forum is the additional safeguard from possible errors of federal law 28 U.S.C. §1292(a)(1) affords. That significant provision, which brings the case before us, provides for appeals of right from the grant or denial of pendente lite injunctive relief. In first amendment contexts, where state actions imposing prior restraints on the exercise of protected rights can cause devastating and irreparable harm, the availability of that remedy often will be vital.

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24. Moreover, because a court, state or federal, engaged in pendente lite review of a grant of a preliminary injunction would be addressing the scope of relief afforded, and at most the likelihood of success on the merits, rather than the actual constitutionality of the law underlying the grant of relief, the pendente lite §1983 proceeding would not be the forum in which a state court would be likely to devise a limiting construction of local law, *see* discussion *infra*, Part V.

The concurrence argues that New Jersey would not permit such a separate injunctive action, but under N.J.R. 4:52-6, would require intervention in the pending enforcement proceeding. The concurrence misconstrues the nature of that rule. It concerns *claims*, not *parties*. It was enacted, following the merger of law and equity in New Jersey trial courts, in order to require litigants advancing an equitable claim in an action at law to remain in the law tribunal rather than to press separately the equitable portion of the action in chancery. *See Tumarkin v. Friedman*, 17 N.J. Super. 20, 85 A.2d 304 (App.Div. 1951); *Government & Employees Ins. Co. v. Butler*, 128 N.J. Super. 492, 320 A.2d 515 (Ch. 1974) (liability insurer in obvious privity with insured, and cannot bring identical claim in chancery when subject to action at law).

This is particularly the case where third parties may be potentially affected by a state court decree binding someone else. A state court decree preventing a source from communicating with a reporter, or a state court decree preventing a church from admitting worshipers, are examples which come to mind. A state court decree closing a religious school — this case — is another. By contrast, appeals from grants or denials of preliminary injunctive relief are, under New Jersey law, entirely discretionary. N.J.R. 2:2-4 (1981); *Delaware River and Bay Authority v. International Organization of Masters, Mates and Pilots*, 45 N.J. 138, 142, 211 A.2d 789, 791 (1965); *Frantzen v. Howard*, 132 N.J. Super. 226, 227, 333 A.2d 289, 289 (App.Div. 1975). Moreover, if a preliminary injunction is granted, such an injunction, whether or not reviewed in a discretionary N.J.R. 2:2-4 appeal, is insulated from review in the Supreme Court of the United States by the "final judgment" limitation on Supreme Court appellate jurisdiction in 28 U.S.C. §1257. By contrast, if this court has appellate jurisdiction under 28 U.S.C. §1292(a)(1) the Supreme court may also review. 28 U.S.C. §1254.[25]

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25. The concurrence argues that the state court preliminary injunction would be reviewable in the U.S. Supreme Court under the collateral finality rule of Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975). This contention is incorrect. *Cox Broadcasting* allows collateral appeal when there has been a final resolution of the merits of the first amendment claim, but when waiting until disposition of the entire case would irrevocably compromise the asserted first amendment right. The collateral first amendment issue, however, must be *finally* adjudicated in state court. The state court, at the preliminary injunction stage in this case has rendered no resolution, final or otherwise, of Shelton's first amendment contentions. The concurrence's attempt to find in *Cox Broadcasting* a theory that the Court has the power to read 28 U.S.C. §1292(a)(1) into §1257 misstates the holding and attributes to the Court the power to amend a federal jurisdictional statute.

The Supreme Court has recently restressed the strictness of the §1257 final judgment requirement. *See* San Diego Gas & Electric Co. v. City of San Diego, 49 U.S.L.W. 4317 (March 24, 1981).

We do not stress access to federal court pendente lite appellate review of grants or denials of preliminary injunctions in cases seeking protection against prior restraints on first amendment rights as a forum selection factor for plaintiffs because state trial judges will in our view (or even in plaintiffs' view) be any more or less likely to commit error than their federal district court counterparts. Nor is it our point that this court will necessarily produce a better first amendment result than that produced by a state court which decides to grant leave for a discretionary interlocutory appeal. Rather, our point is that the legislative preclusion of Supreme Court review of any but final judgments of state courts has created the anomaly that a prior restraint in a state court preliminary injunction can be in force over a long period of time, entirely insulated from any review by that tribunal which has the ultimate responsibility for giving content to the first amendment. The possibility of access to that tribunal pendente lite by virtue of sections 1292(a)(1) and 1254 is a significant, legitimate, even compelling factor in the Churches', parents', students' and faculty member's choice of a federal rather than a state forum. What countervailing considerations can the Board offer in opposition to the recognition of that choice? Certainly the Board has not suggested that insulation from the possibility of pendente lite federal appellate review in first amendment cases is a state interest worthy of consideration.

We conclude that the trial court did not err in rejecting the Board's *Younger* ground for the denial of preliminary injunctive relief.

V.

Pullman Abstention

The Board also contends that *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) required that the district court refrain from granting pendente lite injunc-

tive relief against enforcement of the 1916 law and the regulations issued under it. It urges that had the Superior Court been afforded the opportunity to do so it might have devised a limiting construction of both the law and the regulations which obviated all first amendment concerns.

To put that contention in context, our starting point is the Board's own construction, set out in the pleading it filed in the Superior Court. Its complaint demanded judgment:

> Enjoining and restraining all defendants and their employees, servants and agents from engaging in, assisting in or causing the *offering of any courses or classes of instruction, or engaging in any form of educational instruction*, or offering or providing any credits, awards, certificates or degrees for any such instruction or educational experience which has been given to any enrolled student since September 1, 1979 in or about the property of Shelton College in Cape May, New Jersey, until a license for same is issued by the New Jersey Department of Higher Education.

Exhibit P. 17 (emphasis supplied). Acting on that complaint the Superior Court issued an ex parte order enjoining and restraining the defendants

> from engaging in, advertising, assisting in or causing the *offering of any courses or classes of instruction, or engaging in any form of educational instruction*, or offering or providing any credits, awards, certificates or degrees for any individual except for presently enrolled students . . . ."

Exhibit P. 18 (emphasis supplied). The construction of the statute and regulations set forth in the Board's pleading, filed on its behalf by the Attorney General of New Jersey, leaves no room for limiting instructions. It re-

quests a pervasive prior restraint on engaging in any form of instruction.[26]

The next point to be noted is the posture of the case when the district court made the order appealed from. The district court addressed not a final hearing, but an application for a preliminary injunction. *Pullman* teaches that when a state statute or regulation may be construed definitively by a state court in a manner which may avoid a conflict with a federal constitutional provision it is sometimes appropriate to avoid a final but possibly erroneous federal court interpretation of the statute, and a possibly unnecessary constitutional decision. But the doctrine requires retention of jurisdiction, 312 U.S. at 501, for the obvious purpose of preserving the plaintiffs' choice of a forum for the vindication of federal rights clearly infringed by the state construction ultimately adopted. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

Here the district court has not construed the state statute or regulations at all. It has done no more than tell the Board that its construction, announced authoritatively in its state court complaint, goes further than the first amendment permits, and so construed may not be enforced. This preliminary injunction places no limitation on the power of the New Jersey court to reject the Board's construction in favor of one which would conform to the first amendment.[27] Nor was this a case of an unnecessary constitutional law pronouncement, for the Board's action, had it been successful, would have imposed on the parents, the students and the teacher an irreparable interference with their exercise of rights protected by the religion clauses. If prior to final hearing in this case the New Jersey appellate courts should adopt a

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26. The Board does not on this appeal contend that a prohibition such as it sought in the section 18A:68-5 proceeding could survive first amendment scrutiny. *See infra*, p. 34.

27. The state trial court has in fact substantially rejected the Board's construction. The New Jersey State Board of Education, et al. v. The Board of Directors of Shelton College, et al., *supra*.

narrowing construction avoiding the constitutional issues raised by the Board's attempt to prohibit all teaching at Shelton, no legitimate New Jersey interest will have been invaded by the pendency of the preliminary injunction, and at final hearing the need for federal injunctive relief on those issues may be moot.

In these circustances there is no merit to the Board's contention that the *Pullman* doctrine precluded consideration of pendente lite injunctive relief. The only issue in the state's appeal is whether, substantively, the preliminary injunction went too far. The court ruled:

> I conclude that plaintiffs have every likelihood of prevailing on the merits insofar as the State Board seeks to close Shelton College by forbidding it to advertise and teach, that all of the plaintiffs are threatened with immediate and irreparable injury to their rights of free speech and right to freely exercise their religion, that none of the other parties to this action are prejudiced in any way by Shelton College's continued operation, and that all members of the public at large will ultimately benefit if the constitutional rights of a small religious minority are protected from encroachments by honorable but overly zealous public officials. Preliminary injunctive relief is appropriate.
>
> An order will be entered enjoining defendants from taking or permitting the taking of any action having the effect or designed to have the effect or preventing Shelton College or any of its employees, servants and agents from engaging in any religious, teaching or educational activities or from publicizing or advertising such activities.
>
> Provided that no action is taken in the pending State Court proceeding which would in any way curtail plaintiffs' rights as defined in the order mentioned above, there will be no need to enjoin the prosecution of that proceeding.

482 F. Supp. at 979. In its brief on appeal the Board argues that this very limited grant of injunctive relief was an abuse of discretion. The Board contends

> . . . in order to make a colorable claim under the Free Exercise Clause, there must be an interference with the religious beliefs of the complainant. See *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L. Ed. 2d 15 (1972). In the instant matter, it is clear that the statutory scheme at issue in no way interferes with any religious beliefs of the plaintiffs. They are free to teach and express any doctrine or belief that they desire, completely without interference from the state.

Appellees' brief at 33. This argument, however, simply misstates the record, for exhibits P-17 and P-18 plainly and unequivocally show that the Board sought in the state court a prohibition against any instruction and any advertising. Enforcement by the Board of the broad grant of that relief is all the district court enjoined. The Board's brief does not defend the propriety of such relief. Indeed its misstatement of the record obliquely concedes that the district court was correct in predicting a likelihood of ultimate success on the merits. We agree that success on the merits in resisting a prior restraint against all teaching and all advertising is likely. The district court committed no abuse of discretion in awarding the preliminary injunction preventing the board from obtaining such a restraint.

VI.

The Plaintiffs' Appeals

A. *Appeal No. 80-1253*

The district court also ruled:

> So long as there is no interference with Shelton College's religious teaching or educational programs,

> this Court should abstain from deciding the remaining constitutional issues and permit them to be decided in the pending State Court action. This court will retain jurisdiction pending completion of the State Court proceedings in the event further interim relief should be required.

482 F.Supp. at 980.[28] Thus the present status of the case is that a *Pullman* type stay has been entered, with a retention of jurisdiction to consider further injunctive relief when the state court construes the statute and regulations. The plaintiffs point out, quite correctly, that this order is a denial of a large part of the injunctive relief which they requested. They urge, moreover, that its entry was error. All of the factors bearing on their choice of a federal forum discussed in Part IV above, they urge, are equally relevant with respect to the additional relief they sought. That relief includes a decision on plaintiffs' entanglement and free exercise claims.

The plaintiffs' appeal requires that we consider, in a first amendment context, the interrelationship between the *Pullman* abstention doctrine and the standards for the award of preliminary injunctive relief. Since, as we have already noted in Part V, a grant of pendente lite relief is not a final interpretation of state law by a federal court, and leaves the state court entirely free to place any construction on its law, limiting or otherwise, which it determines to be consistent with the first amendment, *Pullman* considerations have very little weight at the preliminary injunction stage. Once the court has concluded that an immediate dismissal on *Younger* grounds is inappropriate, a motion for preliminary injunctive re-

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28. On January 7, 1980 the court entered an order noting that the action was stayed pending proceedings in the Superior Court of New Jersey, directing the district court clerk to list the case as terminated for administrative purposes, but preserving to the parties the right to reopen. This order is consistent with the retention of jurisdiction requirements of the *Pullman* doctrine.

lief, especially in first amendment contexts, ought, we think, to be considered without regard to the separate question whether a *Pullman* stay of final hearing is appropriate. Assuming the case is not to be dismissed outright, the district court should be guided by the classic requirements for a preliminary injunction:

> The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits.

Doran v. Salem Inn, 422 U.S. at 931. Our review is confined to a determination whether the trial court abused its discretion in applying the quoted standards. *Doran v. Salem Inn*, 422 U.S. at 931-32.

We noted in Part III that the plaintiffs' entanglement and free exercise clause claims are significant; in Part IV that the remedies available in a state tribunal, especially interlocutory appellate remedies, are problematical, and Supreme Court review of a state preliminary injunction is unavailable; and in Part VI A above, that the plaintiffs have been left in somewhat of a dilemma by the limited preliminary relief which was granted. On the other hand, as the district court noted, New Jersey has a significant interest in protecting both the consumers of education and the public which may rely upon the certification of proficiency implicit in the award of a degree. Certainly the likelihood of success on the merits, with respect to the degree granting aspect of the case, was not as clear as was the claim to be free to teach and to advertise.[29] Moreover the district court did not leave

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29. In view of the substantiality of plaintiffs' claim that, by endeavoring to prohibit the granting of credits, New Jersey is attempting to intrude on matters properly the province of Florida law, the district court did not abuse its discretion in permitting Shelton to continue to award credits toward a Florida degree. The New Jersey regulations prohibit the award of credits leading toward a New Jer-

the plaintiffs entirely unprotected. It reserved jurisdiction to consider further applications for interim relief. Given the competing considerations facing the district court, we cannot hold that refusing to grant additional pendente lite relief, when on January 4, 1980 the district court acted initially, was an abuse of discretion.

The plaintiffs also urge that rather than staying final hearing the district court, "in aid of its jurisdiction, or to protect or effectuate its judgments", 27 U.S.C. §2283, should have enjoined the section 18A:68-5 proceding entirely. We reject this contention. The decision to stay the federal court action while a New Jersey state court was given the opportunity to construe that state's statute and regulations was within the permissible range of district court discretion.

B. *Appeal No. 80-2703*

The plaintiffs, on November 20, 1980, applied to the district court for additional preliminary injunctive relief, and that appeal was referred to this panel. Thereafter the appeal was dismissed. Thus we do not address any of the issues to which it was directed.

VII.

In No. 80-1253/54 the order appealed from will be affirmed. In No. 80-2703 the appeal has been dismissed. Each party will bear its own costs.

NOTE 29 — *(Continued)*
sey degree. Apart from the New Jersey degree, the credits are of no significance to New Jersey. Credits are not by regulation transferrable between accredited New Jersey institutions. One accredited New Jersey college has no statutory or regulatory obligation to recognize course work completed at another accredited New Jersey school. If Florida chooses to recognize course work completed at Shelton College, the New Jersey Board of Higher Education has no interest in interfering with Florida's regulatory prerogative.

APPENDIX

A GUIDE FOR OBTAINING THE BASIC INFORMATION FOR APPRAISING NEW JERSEY INSTITUTIONS OF HIGHER EDUCATION

SCHEDULE A

I. Introduction

The questions included in this guide outline the minimum information needed by the State Department of Higher Education before it may proceed with the processing of a request for licensure and for authority to grant an undergraduate degree. A written report based on this guide should be submitted to the Department of Higher Education at least three weeks prior to the scheduled appraisal visit. Four copies are needed. The appropriate regulations and standards should be consulted as each section of schedule A is completed.

When making an application for authority to grant a graduate degree, this guide must be utilized in conjunction with schedule B (a separate document). Any additional information felt to be helpful in interpreting the institutional purposes and programs should certainly be furnished. Four copies of such information should be submitted.

II. Report of the College as a Whole (Directions)

Institutions requesting an initial license to operate shall answer the questions in terms of the proposed institution.

Institutions requesting license renewal shall answer all questions. Where questions are not applicable, please indicate why.

Institutions requestig approval of a new program should confer with departmental representatives concerning the extent to which this section should be filled out.

1. Statement of Purpose

a. What are the educational purposes or functions of your institution, as stated in the articles of incorporation? Quote the complete statement from the incorporation papers.

b. What other statements of purpose exist? Attach sections from the college catalogue and other documents describing these statements.

c. When were your statements of purposes last systematically reviewed? Who participated in that review and what institutional constituencies were represented?

d. If the institution has a long-range plan for the attainment of its purposes, include it and the proposed schedule of implementation.

e. If the institution is affiliated in any way with a religious organization, please describe the precise nature of the relationship.

2. Administrative Organization

a. Briefly describe the administrative organization of the institution, including the functions and responsibilities of each administrative officer.

b. Attach a statement giving names, occupations, and length of term of your governing board and advisory committees.

c. Briefly describe the governance processes of the institution and the roles and responsibilities of the various institutional constituencies.

d. To what extent is the institution involved in cooperative programs with other institutions? Explain how these efforts relate to the purposes of the institution.

3. Finances

a. Include a copy of your financial summary, using the form prescribed in Part V Financial Summary.

b. Describe your plan for long-range financial development.

c. Include copies of the proposed budget for the current and next fiscal years.

d. Enclose copies of the latest C.P.A. audit.

e. Briefly describe the insurance program of the institution.

f. Explain significant increases or decreases in the operating budget occurring in the three year period covered by the financial summary.

4. Educational Programs

a. List the educational programs offered with approximate enrollment. Include the number who completed each program during the last academic year. Include summer, evening, and extension work.

b. Describe the course requirements for each program; what are the requirements for admission and graduation from each program. Attach sections from the college catalogue.

c. What is the total number of classes at the time of the report, including extension and noncredit classes? Copy the form below in answering and attach a copy.

Number of classes with enrollment of:

Under 10	From 10-25 .....
From 26-50	From 50-100 .....
Over 100	Other arrangements .....

d. What provisions are made to ascertain that students have mastered adequately the basic skills needed to do college work?

e. What remedial programs are provided for students with academic weaknesses?

f. Are any programs or classes given off campus? Explain.

g. What are your policies concerning transfer of credit from other institutions?

h. Are all of the courses listed in your catalogue regularly offered? If not, explain. What procedure

is followed in determining which courses will be scheduled? How many courses are listed in the college catalogue; how many are offered the present semester?

i. What provision is made for evaluation of student progress? Explain how information concerning the standards of evaluation and examination procedures, and so forth, are made available to students. Attach representative written materials.

j. Is any special recognition given to students with high scholarship? If so, what?

k. How many students were dropped for poor scholarship last year? How many were otherwise disciplined for poor scholarship; what disciplinary measures were employed?

l. Describe the processes for the establishment, development, and review of educational policy.

5. Faculty

a. Present information in outline form (not exceeding half a page for each) pertaining to the preparation and experience for each member of the faculty, such as degrees earned, names of the institutions and the dates; major and minor fields of preparation; teaching experience, research projects, and other information bearing upon the suitability of the faculty member to perform the educational activities for which he is responsible.

b. How many faculty members are part time? How many are full time? What is the student/teacher ratio and how is it determined.

c. Include a schedule of responsibilities for each faculty member. (Include research, committee, administrative responsibilities, and so forth, as well as teaching load.)

Indicate number of students enrolled in each course. Copy the form below in answering and attach a copy.

	Courses	Taught Sem Hr	Number Students	Hours of Instruction Per Week Each Lecture/Lab		Other Responsibilities
Instructor	Title	Cr	Course	Class		
(Example)	Math II	3	20	3		Dept. Chmn.
James Smith	(Sec A)					½ time
	Physics II	4	15	2	2	Planning Comm. 1 hr. weekly (average)

Mary Moore Etc.

d. What are the faculty personnel policies with regard to academic freedom, economic security, opportunities for professional growth, responsibilities and conditions of appointment and dismissal and other pertinent information.

e. What are the institutional policies concerning faculty organization, faculty committees, and frequency of faculty meetings? What part does the faculty play in the governance of the institution?

f. What institutional problems have been studied by the faculty during the last five years?

6. Library

a. Enclose a copy of the library policy statement required by library regulation IA.

b. Give a brief description of number of volumes, periodical and specialized journals (current and bound), and newspapers available for use as well as media equipment.

c. Explain the accessibility of the library facilities to faculty and students. What evidence is available about the extent of use of the library by faculty and students?

d. What percentage of the budget has been spent during the past fiscal year for salaries, books and

periodicals for the library; for binding and supplies, physical equipment, audio-visual aids supervised by library?

e. What equipment for informational retrieval and storage is available.

7. Students and Student Services

a. What are the admission requirements?

b. Describe the present student body of the institution, including such factors as geographical distribution, economic and occupational status.

c. What per cent of those students entering your institution graduate? Attach a copy of any summaries available concerning the follow-up of graduates.

d. What is the current enrollment? Copy the form below in answering, and attach a copy.

CURRENT ENROLLMENT DATA
ENROLLMENT BY

	MEN			WOMEN		
Level by Years	Full time	Part time	Total	Full time	Part time	Total
Freshmen						
Sophomores						
Juniors						
Seniors						
Graduate Students						
Total						
Unclassified (Special)[1]						

1. but who is permitted to enroll in courses in the regular manner; enrollees in specialized, short-term and noncredit programs.

e. What is the scope of orientation and counseling service?

f. What standardized tests are administered and how are the results used?

g. What health facilities and services are available?

h. What are the policies on tuition, fees and refunds for full-time and part-time students? Attach a statement from the college catalogue.

i. Explain the policies on financial assistance and list the amount of such assistance last year.

j. To what extent do students participate in the governance of the institution?

k. What extracurricular activities, cultural and social, are provided?

8. Physical Facilities

a. Describe briefly the size and character of available buildings and how they are being used.

b. What are the plant needs and plans for expansion?

c. Describe the facilities for faculty offices, administrative offices, and supportive services.

d. What living facilities, if any, are provided.

e. What laboratory facilities are provided?

III. Report on Proposed New Degree Program (Directions)

Institutions requesting initial authority to grant a degree shall complete this section.

Institutions requesting approval of a new degree program shall complete this section.

Institutions requesting renewal of licensure and approval should complete this section only if new approval is being requested at the same time.

If the information requested has already been supplied in answering questions in section II, do not repeat, but indicate where in your report that information can be found.

1. Objectives

a. What are the objectives of the proposed program as they relate to institutional purposes?

b. What indication of need for this program is there? To what extent do other institutions in this State or nearby states, public and private, meet the need?

c. Compare the proposed program with similar programs of high quality (if they exist) offered by other institutions.

2. Educational program

a. Describe the program, and give models of typical programs.

b. What are the requirements for admission and graduation?

c. What special resources are available or need to be secured?

3. Faculty

a. What faculty is to be utilized? What are their special qualifications? From where are they to be drawn?

4. Finances

a. What are the estimated costs of the program?

b. What is the source of the estimated income?

c. Enclose a proposed budget for the new program.

d. Give a long-range plan (at least five years) summarizing the financial aspects of the program.

5. Physical Facilities

a. What physical facilities are to be utilized?

b. If the program is in the physical, natural, behavioral, or applied sciences, or technology, what laboratory facilities are available? Are there plans for additional laboratory facilities?

6. Library

a. What specialized material, (books, periodicals, journals, or other) is available for the new program?

IV. Exhibit Material to be Submitted

1. A copy of the incorporation papers of the institution.

2. A copy of the rules or statutes under which the institution operates. A copy of the bylaws of the governing board.

3. Class schedules for all semesters or sections of the current year.

4. Faculty personnel policies and salary schedules.

5. Admission blanks.

6. Student and faculty handbooks.

7. The official college catalogue.

8. Student accumulated record form.

9. Summary of information about the academic achievements of your students. Comparisons with colleges judged to be comparable are encouraged.

10. Summary of scholastic achievements of entering freshmen for the past academic year showing the rank of each student in high school graduating class.

11. Table showing distribution of final grades by individual teachers within each department for the past semester.

V. Financial Summary

1. Current Income

This includes all funds which are expendable for the current operations of the institution. It does not include receipts to be added to the loan funds, endowment and other nonexpendable funds, annuity funds, and funds for plant additions.

a. Education and general income: All current general income which may be used for the instructional, research, and extension and public service programs, and for general expenses of the institution. Also all current restricted income to the extent such funds have been expended during the period covered by the statement.

1. Student tuition and fees: All tuition, general and specific fees paid by or for the students to the institution for educational services. Does not include charges for services rendered by resident halls, dining rooms, student hospitals, or other auxiliary enterprises. Include all fees assessed whether or not collected. Fee and tuition remissions or exemptions should be assessed and reported as student fees income although it is not intended to effect collection from the student. A corresponding amount, as well as the amount of other student aid granted out of current income, should be known as expenditures in the statement of current expenditures. Include student fees paid by Veterans Administration and by other governmental units.

Percent of total income:

Current Year	One Year Ago	Two Years Ago

2. Governmental appropriations: Income received from governmental sources out of governmental rev-

enues which are expendable for general educational purposes. Income from governmental agencies for contract research and services should not be shown here but should be reported under the category: e. Contract research and services. Do not include capital outlay appropriations.

Percent of total income:

Current Year	One Year Ago	Two Years Ago

3. Endowment income: Income earned on the investment and other nonexpendable funds available for general educational purposes. Do not include earnings designated for other than educational and general, such as, auxiliary enterprises, student aid, loan funds, or plant additions; those items are included elsewhere in "Current income."

Percent of total income:

Current Year	One Year Ago	Two Years Ago

4. Gifts and Grants: All unrestricted gifts expendable for educational purposes. Also grants for this purpose to the extent that they were expended during the period covered by this report. Do not include funds for research and special programs.

Percent of total income:

Current Year	One Year Ago	Two Years Ago

5. Contract research and services: All income from research projects organized separately from the departmental research conducted as part of the instructional program.

Percent of total income:

Current Year	One Year Ago	Two Years Ago

6. Contributed services: Include estimated monetary value of nonsalaried services in terms of salary equivalencies. In institutions organized and managed by religious orders, societies, or similar groups, the personnel of the institution may receive no monetary compensation for their services.

Percent of total income:

Current Year	One Year Ago	Two Years Ago

7. Departmental services and sales: Incidental income of educational departments resulting from services performed, the sale of publications, and other similar activities.

Percent of total income:

Current Year	One Year Ago	Two Years Ago

8. Organized activities relating to educational departments: Income of all activities organized and operated in connection with educational departments and conducted primarily for the purposes of giving academic instruction to students (that is, medical school hospitals, home economics cafeterias, agricultural college orchard, dental clinics, demonstration schools, and so forth). Where these enterprises are not conducted primarily for educational purposes, the activity should be classified as an auxiliary enterprise.

Percent of total income:

Current Year	One Year Ago	Two Years Ago

9. Any additional items not mentioned above which are considered a regular part of the educational and general income at your institution. Describe each.

Percent of total income:

Current Year	One Year Ago	Two Years Ago

TOTAL EDUCATIONAL AND GENERAL INCOME (1-9)

2. Auxiliary Enterprises Income: Gross income of enterprises existing primarily for students, faculty, and staff (dining halls, dormitories, bookstores, athletics, student unions, and so forth).

Percent of total income:

Current Year	One Year Ago	Two Years Ago

3. Student Aid Income: All income specifically designated for scholarships, fellowships, prizes, and other purposes. Such income is received usually in the form of gifts, grants, and endowment income designated for this purpose. Additions to loan funds are not included here.

Percent of total income:

Current Year	One Year Ago	Two Years Ago

GRANT TOTAL CURRENT INCOME (1,2,3)

4. Current Expenditures: Educational and general expenditures — All current expenditures of all departments and activities of the institution concerned with the educational program; with the counseling, guiding and testing of students; and the maintenance of records of student achievement; public services and information, and administrative and general expenses.

a. General administration: Expenses of the general executive or administrative officers of the institution including the governing board and the president. The expenditures of the offices of the registrar, student

personnel dean(s) may be reported here if not classified as student services expenditures.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

b. Instruction and departmental research and specialized educational activities: All expenses for instructional programs, and for that research which is conducted in educational departments and not separately budgeted and financed as organized research; faculty salaries.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

c. Libraries: Total expenditures for libraries, including salaries and wages, supplies and expenses, books, microfilms, periodicals and binding.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

d. Plant operation and maintenance: Cost of operating and maintaining the educational and administrative buildings including classrooms, laboratory and other instructional areas; libraries; and administrative buildings, and residences furnished rent free to staff. Expenditures distributable or directly chargeable to auxiliary enterprises and activities other than educational and general are charged to the appropriate activities.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

e. Student services: Expenses for the administration of student activities, admissions; student records; student counseling and testing; the net cost to the institution of student organizations and activities.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

f. Organized research: Cost of separately budgeted and financed research projects and all separately organized research divisions, such as, research bureaus, research institutes, and experiment stations.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

g. Public service and information: Expenditures for publicity, public relations and other public services and information; and development programs, college promotion, and fund raising. Include such specific activities as public lectures, radio programs, public meetings, and so forth.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

h. General institutional: Expenses of all remaining noninstructional or educational general expenditures of the institution as a whole, exclusive of libraries, physical plant operation and maintenance, student aid, auxiliary enterprises, intercollegiate athletics, and annuity payments.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

i. Other: Other expenditures not mentioned above which are considered a regular part of the educational and general expenditures at your institution. Describe.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

TOTAL EDUCATIONAL AND GENERAL EXPENDITURES (a-i)

5. Auxiliary Enterprises Expenditures: Gross expenses of these enterprises. Physical plant, general expenses, administrative charges, and other indirect costs of the enterprises should be included.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

6. Student Aid: All expenditures for scholarships, fellowships, and prizes. Do not include student loans. Student aid in the form of remission of tuition and fees or the exemption from the payment of such charges should be reported. Service scholarships where service is required should be assigned as expense of the department where service is rendered.

Percent of total expenditures:

Current Year	One Year Ago	Two Years Ago

GRAND TOTAL

ROSENN, *Circuit Judge*, concurring and dissenting:

In this case the district court took the extraordinary step of interfering in a pending state proceeding because it found that portions of the state court's preliminary order imposed "both great and immediate" irreparable harm — harm sufficient to warrant federal interference under the narrow, *Younger*-based exception to the general *Younger*[1] rule. The district court committed no reversible error in thus exercising its narrowly circumscribed equitable discretion, and I would affirm the district court in all but one respect that I shall discuss hereinafter. *See* Part III, *infra* at 27. However, even in concurring I am constrained to write separately, because in affirming the award of injunctive relief against the New Jersey State Board of Higher Education (the Board), the majority holds that the presence of plaintiffs in the federal action who were not parties to the state proceeding immunized Shelton's federal complaint from the limiting principles of *Younger*. By reaching out to fashion such a rule, the majority has propounded and answered a question of first impression in this circuit without the benefit of prior consideration by the district court or significant briefing by the parties. Moreover, in so doing the majority endeavors to distinguish or discredit a substantial body of law to the contrary set forth in cases factually identical[2] or analogous[3] to this one. Finally, under the majority's rule, this court becomes the

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1. Younger v. Harris, 401 U.S. 37 (1971).

2. Corpus Christi Peoples' Baptist Church, Inc. v. Texas Dep't of Human Resources, 481 F. Supp. 1101, 1110 (S.D. Tex. 1979), *aff'd mem.*, 621 F.2d 438 (5th Cir. 1980).

3. *See* Hicks v. Miranda, 422 U.S. 332, 348-349 (1975); Allee v. Medrano, 416 U.S. 802, 830-32 (Burger, C.J., concurring); ACLU v. Bozardt, 539 F.2d 340, 343 (4th Cir.), *cert. denied*, 429 U.S. 1022 (1976); Doe v. Maher, 414 F.Supp. 1368, 1372 (D. Conn. 1976) (three-judge court), *vacated on other grounds*, 432 U.S. 526 (1977) (per curiam).

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first to hold that direct nonparty interference in a state-court proceeding is *not* subject to *Younger* considerations. I respectfully disagree with the majority's adoption of this rule and therefore I cannot join in part IV of its opinion.

I would also vacate one portion of the district court's order and I dissent from the majority's decision insofar as it upholds this portion of the order. Thus I cannot join in Parts VI A of the majority's opinion. In all other respects I would affirm the district court's order and I join in Parts I, III, and VI B of the majority's opinion.

I.

This case presents a question of whether the injunctive power of a federal court is available as a means of relief from state agency action in a state court to enforce an allegedly unconstitutional state licensing scheme. The federal plaintiffs in this action sought not to restrain the Board from pursuing a *threatened* state suit; rather, they invoked the power of the federal court to halt the Board's pending state-court action against the board of directors and the two principal officers of Shelton College (Shelton). Because the New Jersey state court had awarded the Board preliminary injunctive relief prior to the award of any relief in the federal court, the latter also considered the federal plaintiffs' request for relief from the Board's enforcement of the state court's injunctive order.

In affirming the district court's order, the majority reaches its result by applying a legal rule which does not appear in the district court's opinion. The majority concludes that this case does not present an occasion for *Younger* dismissal because most of the federal plaintiffs were not parties to the state proceeding. This, according to the majority, gives the federal-only plaintiffs[4] a right

4. I use the term "federal-only plaintiffs" to designate the Churches, students, parents and teacher. Shelton, the other federal plaintiff, bears a closer relation than any of these to the state-court

to a federal remedy for the same reason that one party may obtain federal relief from threatened prosecution under an unconstitutional state criminal law while at the same time another party may be prosecuted under the same law challenged in the federal suit. *See Steffel v. Thompson*, 415 U.S. 452, 455-56 (1974); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975). Examination of the relief granted in this case, however, belies any such similarity between this appeal and *Steffel* or *Doran* — not because the federal-only plaintiffs have no separate interests, *see, e.g.*, minority typescript op. at 16 n.13, 24-27, *infra*, but because neither *Steffel* nor *Doran* authorized such separate federal-only plaintiffs to interfere directly in state-court proceedings.

The New Jersey Superior Court action was brought by the Board pursuant to N.J. Stat. Ann. §18A:68-5 which specifically empowers the Board to sue in that court to restrain a corporation from carrying on the business of instruction for the purpose of conferring a degree without a state license.[5] In the suit to "restrain the corporation" the Attorney General found it sufficient to name as defendants not the corporation, but simply its Board of Directors ("the principal governing body of Shelton College"), its president and chief executive officer, and its chancellor.

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defendants. For this reason, all members of this panel, as well as Shelton itself, treat Shelton as a state-court litigant in all but the most technical sense. *See* typescript majority op. at 4, 17, 31 n.25; typescript minority op. at 3, 11, *infra*.

5. N.J. Stat. Ann. §18A:68-5 provides in pertinent part:

> When it shall appear that any corporation is carrying on the business of *such* instruction or teaching [*viz.*, "instruction or learning . . . for the purpose of admitting any person to the grade of a degree" (*id.*, §18A:68-3)] or conferring any such degree, or giving any such diploma without such license, *the board* of higher education . . . *may institute a civil action* in the superior court *to restrain the corporation* from the transaction of any such business. . . .

(Emphasis added.)

The federal complaint was brought by several parties, one of whom was the corporation itself. In addition to a temporary restraining order, the complaint sought, *inter alia*, the following relief:

> (1) That the Court declare that the action of the defendants in imposing the aforesaid requirements of the statutes and regulations is unconstitutional;
>
> * * *
>
> (3) That the Court preliminarily and permanently enjoin the defendants from applying the aforesaid statutes and regulations to the religious educational ministry which is Shelton College;
>
> * * *

The district court ordered that the defendants be enjoined from taking, or permitting the taking of, any action designed to have the effect of or preventing Shelton College

> (a) from engaging in any educational activities or in any religious teaching;
>
> (b) from publicizing or advertising such activities, or
>
> (c) from certifying to a student the satisfactory completion of work in a course or other educational activity through awarding that student a credit therefor.

Thus, Shelton and the other federal plaintiffs obtained relief designed to prevent enforcement against Shelton's managing body in the pending state proceeding of either the state licensing scheme or the preliminary state-court order.[6] For this reason, the federal pro-

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6. It is from this relief that the Board appeals. It is to this relief that the majority adverts when it concludes, in Part IV, that the dis-

ceeding squarely implicated *Younger* principles. Given this undisputed set of facts, the presence of additional parties in the federal action could not, in itself, obviate the need for the district court to consider dismissal.

> The rule in *Younger* v. *Harris* is designed to "permit state courts to try cases free from interference by federal courts," 401 U.S., at 43, particularly where the party to the federal case may fully litigate his claim before the state court. Plainly, "[t]he same comity considerations apply," *Allee* v. *Medrano*, 416 U.S. 802, 831 (1974) (Burger, C.J., concurring), where the interference is sought by some, such as appellees, *not parties to the state case*.

Hicks v. Miranda, 422 U.S. at 349 (emphasis supplied).[7] Nevertheless, portions of the preliminary relief awarded by the New Jersey court imposed irreparable harm sufficiently "great and immediate" to warrant federal interference even under the narrow exception to the policy of judicial nonintervention set forth in *Younger* itself.[8] In announcing its alternative rationale for reach-

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trict court committed no error. Thus it is the propriety of this relief that forms the crux of the *Younger* issue on this appeal.

7. The interests of the federal-only plaintiffs in this case may or may not fall within the category of interests sufficiently "intertwined," 422 U.S. at 348-49, with those of Shelton to require *Younger* dismissal on the basis of a simple application of *Hicks* alone. *But see* Bickham v. Lashof, 620 F.2d 1238, 1243-45 (7th Cir. 1980). However, in light of the circumstances discussed fully below it is unnecessary to rely on *Hicks* alone in order to conclude that, with regard to the relief at issue in the Board's present appeal, *Younger* principles were as applicable to the federal-only plaintiffs as they were to Shelton.

8. *Younger* teaches that there is a narrowly circumscribed class of "extraordinary circumstances in which the necessary irreparable injury can be shown" that would warrant federal interference in pending state proceedings. 401 U.S. at 53. Identification of such "unusual situations," *id.* at 54, calls for an exercise of equitable discretion, albeit a discretion circumscribed by "Our Federalism." *Id.* at 44. The district court in this case entered its order because failure

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ing the same result, however, the majority here fashions a rule that goes beyond anything to be found in *Doran v. Salem Inn, Inc.*, and *Steffel v. Thompson*, the cases upon

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NOTE 8 — *(Continued)*

to award any relief would mean that "[b]y state fiat a religious community will be destroyed." 482 F. Supp. at 974. Operating solely within the narrow confines of equitable discretion that comprise *Younger*'s self-contained exception, the district court granted relief to "prevent the immediate irreparable violation of plaintiffs' constitutional rights." *Id.* at 979. Given the absence of any reason to believe that its findings are clearly erroneous, I find no abuse of discretion in the district court's conclusion that because some of the rights impaired by the preliminary injunction of the state court were so important, and the threatened injury to those rights so irretrievable, plaintiffs have stated a cause of action within the confines of the *Younger* exception for "both great and immediate" irreparable harm. 401 U.S. at 46. As the district court put it, this was a case in which, at least with respect to some of the requested relief, the *Younger* and *Pullman* doctrines "must give way." 482 F. Supp. at 978.

No mention is made by the district court of any reason why distinctions among the interests of the multiple parties in this case made *Younger* inapplicable. This absence is telling in the face of the majority's assertion that, for purposes of *all* the relief at issue in this case, departure from *Younger* was required by the existence of such separate interests. Even under the majority's legal theory, there must be a heavy factual component to the issue whether, as to any particular type of relief, the relevant interests are so separate as to render *Younger* inapplicable. *Cf.* County of Imperial v. Munoz, 49 U.S.L.W. 4005, 4007 (Dec. 2, 1980) (remanding for factual determination of whether federal-only plaintiffs were "strangers" to the state-court suit); Allee v. Medrano, 416 U.S. at 832 n.8 (Burger, C.J., concurring) ("There is no need now to attempt to further define those situations in which it would be proper to impute the state criminal prosecution of one who is not a federal plaintiff to one who is. The association of the state criminal defendant and the federal plaintiff necessary for imputation will depend upon facts of joint activity and common interest."). Because the district court rendered its decision without recourse to the majority's legal theory, it would appear that under the majority's theory at most a remand is appropriate, not affirmance.

which it relies.[9] For the majority effectively holds that future state-court defendants whose federal injunctive suits are barred by *Younger* need only add to their federal complaint new parties who have separate interests, in order to obtain exactly the same relief that *Younger* would otherwise bar. Thus, the new parties can now assert not only their *own* rights in a federal court proceeding; they may also bar the state plaintiff from litigating these same issues against the *original* state defendant in state court, under threat of contempt sanctions in the federal court.[10]

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9. I recognize that the majority would have its opinion read only for the uncontroverted propositions that (a) the federal-only plaintiffs have, in some significant sense, interests distinct from Shelton, and (b) that separateness is sufficient to satisfy the test for entertaining a federal proceeding *not* directed toward interfering in a pending state proceeding. Unfortunately, this appeal does not embody a dispute whose resolution can be reached by application of those propositions alone. *See* minority typescript op. at 4 n.6, *supra*.

10. The majority's opinion directs that *Younger* considerations be eschewed whenever a state-court defendant asks a federal court to restrain pending state litigation against him, so long as he adds a new plaintiff to his federal complaint, one who is interested in affecting the outcome of the original state proceeding and who may have sufficiently distinct interests to meet the *Doran* test in a hypothetical separate suit (*i.e.*, a federal proceeding that would *not* be aimed at directly interfering in the pending state proceeding). I believe such a proposition must be rejected. However, what the majority *holds* is a different matter, because the facts upon which it affirms the district court are narrower. The majority's holding is an affirmance, on its multiple-party separate interest theory, of a federal injunction directed at preventing the Board from enforcing a preliminary order arising out of the then-pending Superior Court proceeding. Insofar as interference with other types of state enforcement action is not here enjoined, much of what the majority says can be characterized as dictum.

Characterization as dictum fails to neutralize the fundamental problem with the majority's opinion, however, because application vel non of the majority's legal rule does not turn on any factual peculiarities unique to this case. For instance, at typescript 36-37, the majority implicitly holds that *Younger* considerations are inapplica-

In *Doran* the Supreme Court reversed the grant of a preliminary injunction to a tavern operator, M & L Restaurant, Inc., which had chosen to challenge the constitutional validity of a town ordinance first by filing a suit for federal injunctive and declaratory relief, and then, before obtaining preliminary federal relief, by violating the ordinance and subjecting itself to criminal prosecution in the state courts. M & L was one of three federal plaintiffs all seeking the same relief. However, the other two, Salem Inn, Inc., and Tim-Rob Bar, Inc., refrained

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NOTE 10 — *(Continued)*

ble to *any* part of the federal complaint. Nor can application of the majority's rule be specially justified, as the majority suggests at typescript op. at 21, on the basis of the prospective effect of the state-court's order. There is no basis in *Younger* jurisprudence for the majority's attempt to posit a rigid distinction between (a) cases such as this, where the federal plaintiff seeks to enjoin the restraining effect of the prior state-court order on *future* acts, or *future* enjoyment of federal rights, and (b) other cases where the federal plaintiff seeks to enjoin the retributive effect of state-court proceedings previously initiated due to *past* acts that occurred prior to the filing of the federal complaint. *See* Moore v. Sims, 442 U.S. 415 (1979) (*Younger* dismissal was called for even though federal relief was issued only after the pendente lite state-court order had already deprived the federal plaintiff of child custody); Trainor v. Hernandez, 431 U.S. 434 (1977) (reversing and remanding, for consideration in light of *Younger*, a federal injunction directing the return of property that had already been seized pursuant to a pendente lite state-court order); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (vacating and remanding, for consideration in light of *Younger*, a federal injunction enjoining the execution of a state court order closing a theater). *Cf.* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) (a federal injunction to enjoin a state-court plaintiff from giving effect to or availing itself of the benefits of a state court injunction is "an injunction 'to stay proceedings in a State court' "), *quoted in* County of Imperial v. Munoz, 49 U.S.L.W. 4005, 4006 (Dec. 2, 1980). Understandably, the majority has not sought to emphasize its attempted distinction. *But see* majority typescript 21. The text of my concurrence elaborates fully the perceived error in those other arguments that the majority *does* emphasize.

from violating the challenged ordinance until they had obtained federal preliminary injunctive relief enjoining the town's prosecution of the federal plaintiffs. The federal district court concluded that Salem Inn and Tim-Rob were entitled to preliminary injunctive relief. In this respect its holding was affirmed by the Second Circuit and the Supreme Court. The latter noted that since there were no ongoing state criminal proceedings against these two plaintiffs, they were entitled to choose a federal forum as the one in which they would seek a declaration that the state statute was unconstitutional. The Court was troubled, however, because

> prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction; unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm. Moreover *neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute.*

422 U.S. at 931 (emphasis added). Thus, the Court approved the use of federal injunctive power to negate the state's future enforcement power as to Salem and Tim-Rob, the parties who, prior to the award of federal injunctive relief, had refrained from violating the challenged ordinance. This use of the federal injunctive power, however, was to have no application to the state's enforcement of the ordinance against M & L; "the State is free to prosecute others who may violate the statute." *Id.*

The lower federal courts had reached an opposite result with respect to the power of the state to prosecute

M & L, the pre-injunction violator of the statute who was also a federal plaintiff. Insofar as Salem and Tim-Rob were entitled to have the constitutionality issue heard and decided in the federal forum, the district court found it "anomalous," 364 F.Supp. 478, 482 (E.D.N.Y. 1973), and the Second Circuit found it to be inequitable and wasteful of the state's judicial resources, 501 F.2d 18, 22 (1974), to deny M & L the same federal forum, *Younger v. Harris* notwithstanding.

The Supreme Court, rejecting the lower court's results with respect to M & L, reached a conclusion that is compelling in this case. It held that "the interest of avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism in this particular area of the law." 422 U.S. at 928.

Similarly, the plaintiff in *Steffel v. Thompson* was able to obtain federal declaratory relief from threatened state prosecution, even though the acts of his companion, Becker, had already prompted the local authorities to begin a criminal prosecution against her based on the very same policies challenged by Steffel in his federal complaint.

In *Doran*, the pendency of the federal suit brought by Salem and Tim-Rob did not preclude the imposition of criminal sanctions against M & L; in *Steffel*, the state's ability to prosecute Becker was independent of Steffel's federal suit. The only federal plaintiffs whose federal suits were *not* barred in those cases were those who were not defendants in ongoing state proceedings. These cases therefore demonstrate that one party cannot be denied a federal forum merely because there is a threat that, in an ongoing state proceeding, the state court may reach a legal conclusion inconsistent with that of the federal court on a matter of federal law as applied to similar activities engaged in by separate individ-

uals.[11] *Doran* requires, however, that the injunctive power of the federal court, properly invoked by one party subsequent to the filing of a state-court action which raises the same legal issue as to other parties, be so circumscribed as not to bar the state court from moving independently in the pending parallel suit.

The majority opinion permits precisely what *Doran* stated could not happen; it allows the federal court to dictate the terms by which the state court will resolve the concrete dispute between separate parties to the parallel proceeding.

The majority even goes so far as to suggest that because the grant of declaratory relief to a separate party would be "just as disruptive to state enforcement as direct interference in the state proceeding in the form of an injunction," the availability of separate declaratory relief undercuts the "initially appealing" theory that

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11. There can be no such inconsistent conclusions, however, unless each system, state and federal, is permitted to generate its own legal product in any existing case without mid-litigation interference by a court in the other system acting on a subsequently-filed suit. There are special exceptions, of course, for subsequently-filed state court proceedings. *See* Hicks v. Miranda, 422 U.S. at 349 (where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of Younger v. Harris should apply in full force); Doran v. Salem Inn, Inc., 422 U.S. at 929 (when the criminal summonses issued against M & L on the days immediately following the filing of the federal complaint, the federal litigation was in an embryonic stage and no contested matter had been decided; in this posture, M & L's prayer for injunction is squarely governed by *Younger*). Since the state proceeding in this case was begun prior to the filing of the federal complaint, these exceptions are irrelevant to this case.

There are also exceptions for subsequently-filed federal complaints: *Younger* spells out these exceptions. *See* note 8, *supra*. My dispute with the majority is not over whether exceptions exist. Rather, I take issue with the notion that *Younger* itself is inapplicable due to the presence of additional parties in the federal action.

Younger generally forbids direct interference in state proceedings. *See* majority typescript op. at 20-23. In advancing this argument the majority lapses into precisely the same error committed by the Second Circuit in *Doran* — an error that required subsequent reversal in the Supreme Court. As previously discussed, *see* minority typescript op. at 8-9, after the Second Circuit concluded that Tim-Rob and Salem Inn had properly invoked federal court jurisdiction, the court was "struck by the practical wisdom" of affording M & L the same federal forum, notwithstanding the pendency of its state-court criminal proceeding. Because precisely the same constitutional issues would be raised by all three litigants, the "more substantial considerations . . . favor[ed] . . . extending federal protection, at least in this case, to M & L. . . ." Such considerations included the danger of "contradictory outcomes" in state and federal court. 501 F.2d at 22. This reasoning was unequivocally rejected by the Supreme Court. "[T]he interest of avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism in this particular area of the law." 422 U.S. at 928. Thus, contrary to the suggestion of the majority, *Doran* squarely holds that pursuit of federal declaratory relief cannot "directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." *Id.* at 931.

The majority commits a further error. It permits the federal court to dictate the terms of the state-court proceeding at the suit of the very party, among others, whose federal suit was barred by the holding in *Doran* — namely, the state-court defendant.

For purposes of *Younger* analysis here, the corporate plaintiff, Shelton, must be treated as if it were a defendant in the state court. The request for relief by the

corporation in federal court is nothing less than a claim that the New Jersey Superior Court fails to offer the state-court defendants an "adequate legal remedy" for their alleged constitutional injury. Inasmuch as the corporation's board of directors was already a party to the Superior Court action, and had the ultimate authority to direct the agents of the corporation to litigate any constitutional issues in federal court, the corporation had no interests separate from those of the state-court defendants. The corporation had nothing that would give it the independent right to invoke federal relief where, under a *Younger* analysis, the state-court defendants would have had none.

I stress this point because of the serious and far-reaching implications of the majority's holding. Under the majority's rule, a state-court defendant in this circuit will be able to ignore the *Younger* line of cases so long as he is able to enlist additional parties to his federal complaint who profess an interest in the outcome of the state-court litigation. For instance, this means that if the federal complaint filed by M & L in *Doran* were to be filed tomorrow in New Jersey, and its factual allegations were to be assumed true as in the *Doran* decisions, such a complaint could not be dismissed on *Younger* grounds so long as M & L included in its complaint some of its customers, employees, shareholders or officers who were not named as defendants in the state criminal summonses.

For the foregoing reasons, I submit that the majority's reasoning here is squarely at odds with *Doran* and *Steffel*. At least one other court recently has faced the precise question addressed by the majority and reached an opposite result. In *Corpus Christi Peoples' Baptist Church, Inc. v. Texas Department of Human Resources*, 481 F. Supp. 1101 (S.D. Tex. 1979), *aff'd mem.*, 621 F.2d 438 (5th Cir. 1980), the district court addressed the question in the context of a suit nearly identical in all respects to this one. The federal suit alleged that state li-

censing requirements, as applied to two church-owned and church-operated child-care homes, infringed first, fifth, ninth, and fourteenth amendment rights of the federal plaintiffs. Problem children were placed in those homes and, contended the plaintiffs, "saved" through religious instruction. The federal plaintiffs included the church, staff members of the homes, children residing at the homes, and parents of these children. All of the plaintiffs who testified felt that they would be irreparably harmed if the homes were closed by the state.

The federal district court held that *Younger* principles applied due to a pending suit brought by the state agency to enforce the requirements of the licensing scheme. The church was a defendant in the state-court proceeding. Apparently, the children, parents, and staff members were not. "Technically," said the court, the *Younger* doctrine would not apply to these federal-only plaintiffs.

> [I]f there were as an additional plaintiff in this case another church operating another child-care institution without a license, raising the same First Amendment contentions through the same attorney, the Court would not invoke the abstention doctrine as to that hypothetical plaintiff simply because the resolution of the pending state case would, as a practical matter, likely resolve the same common issues of law.
>
> It seems to the Court, however, that the facts of this case present an entirely different picture. The bedrock issue is whether or not the state can enforce its licensing requirement for child-care homes when such a home is owned and operated by a church. The rights of the employees of the home, the children in the home and their parents are merely appendages to that central question. If, at the conclusion of the state case, it is resolved that the constitutional rights of the church are para-

> mount to the interests of the state, then the home will continue to operate without the offending licensing requirements. The corresponding rights of the children, their parents, and the staff members of the home will automatically be vindicated. On the other hand, if after proceeding through the state court case, including the rights of appeal to the United States Supreme Court, it is determined that a child-care home must be licensed even if it is operated by a church, then seemingly the collateral claims of the other plaintiffs that they have a constitutional right to either work at or live in such a home or place their children there would become academic, as the home itself would be forced to close. This, therefore, would seem to be the classic case contemplated by the Supreme Court in *Doran v. Salem Inn, Inc., supra*, when it stated that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any one of them. . . ." 422 U.S. at 928.

481 F. Supp. at 1110 (footnotes omitted). The majority seems to attack *Corpus Christi* for its failure to expressly recognize that, for some purposes, the federal-only plaintiffs have free-exercise rights that are not "mere appendages" to the church's rights. I doubt that the district court meant to go so far as the majority says it does. It is more likely that the court was concerned with the limited extent to which the federal-only plaintiffs' rights were implicated in the relief sought by the state-court plaintiffs. In any event, my analysis here depends not at all on total identification of the federal-only plaintiffs' rights with those of Shelton. In no sense do I assert that the case before us is one in which the outcome of the state litigation is "dispositive" of the federal-only plaintiffs'

first amendment interests — I explicitly assert the contrary. *See, e.g.*, minority typescript op. at 24-27, *infra*.

Other courts have held federal-only plaintiffs barred by *Younger* in cases where the nature of the relief sought by the federal-only plaintiffs would, as in this case, necessarily interfere with pending state-court proceedings against other federal plaintiffs. In *ACLU v. Bozardt*, 539 F.2d 340 (4th Cir.), *cert. denied*, 429 U.S. 1022 (1976), "Jane Koe" and the ACLU sought federal equitable relief blocking state disciplinary proceedings initiated against Koe by the disciplinary board of the South Carolina Bar. Plaintiffs also sought declaratory and injunctive relief to prevent the disciplinary board from initiating subsequent similar proceedings against other ACLU attorneys. The Fourth Circuit affirmed the holding of the district court that *Younger* barred federal intervention in the state disciplinary proceedings. In reaching its decision, the circuit court addressed the ACLU's contention that even if dismissal of Koe's complaint was appropriate under *Younger*, dismissal of the ACLU's complaint was improper because the ACLU was not a party to a pending state proceeding.

The ACLU contended that it was asserting the rights of associated attorneys other than Koe who had no state proceedings pending against them, and were therefore not burdened by *Younger* restrictions. The Fourth Circuit, however, found that

> because federal equitable relief is sought by the ACLU on behalf of its members, a grant of federal relief would necessarily have an effect upon all ACLU associates, *including Koe*. To permit the ACLU to assert rights of those associates not bound by the *Younger* restrictions in order to obtain federal equitable relief which would necessarily benefit all its associates would directly interfere with the pending state proceedings, and have the effect of circumventing the *Younger* restrictions which bar Koe

> from seeking direct federal relief. We conclude that *Allee* and *Steffel* were not intended to be interpreted so as to permit a litigant to avoid *Younger* restrictions merely by joining his claim with claims of others asserting a joint interest.

539 F.2d at 343 (emphasis added).

Similarly, in *Doe v. Maher*, 414 F. Supp. 1368 (D. Conn. 1976), *vacated on other grounds*, 432 U.S. 526 (1977), the district court noted that

> [t]he fact that the adult plaintiffs in this action, with the exception of the intervenor, Linda Robustelli, are defendants in pending contempt proceedings instituted by the [state] commissioner under the authority of [state law] raises a serious issue of abstention in light of *Younger v. Harris* . . . and its progeny. The intervention of Ms. Robustelli, who has been threatened with prosecution, but against whom no action is presently pending, cannot circumvent the issue, for while she may be entitled to declaratory and injunctive relief on a personal basis, *Doran v. Salem Inn, Inc.*, . . . she cannot, under the guise of representing a class, dispense with the *Younger* considerations for those members of the class who are presently being prosecuted. "The requirements of *Younger* are not to be evaded by artificial niceties." *Allee v. Medrano*, 416 U.S. 802, 833 (1974) (Burger, C.J., concurring in the result in part and dissenting in part).

414 F. Supp. at 1372.[12]

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12. Allee v. Medrano involved a request by a union and its members for federal injunctive relief from a persistent pattern of police misconduct, including the filing of criminal charges. *Younger* issues were therefore implicated. For purposes of evaluating some of the requested relief, the record before the Court was inadequate to indicate whether there were pending prosecutions, or even whether the district court intended to enjoin them if there were.

Thus, until today, no court had interpreted *Doran* and *Steffel* as authorizing interference by federal courts in pending state proceedings, even at the suit of parties with interests separate from those of the state-court defendants. Beyond question, the majority has departed from all extant federal court interpretations of the relevant Supreme Court precedent.[13]

NOTE 12 — *(Continued)*
The Court therefore remanded the case for further findings and reconsideration in light of Steffel v. Thompson, a decision that had not been available at the time of the district court's decision. Chief Justice Burger, in a concurrence, discussed the *Younger* problems that would face the district court on remand:

> To the extent that they can prove standing, the individual appellees will be seeking federal court interference in their own state court prosecutions. The union, to the extent that it has standing, will be seeking interference with state court prosecutions of its members. There is an identity of interest between the union and its prosecuted members; the union may seek relief only because of the prosecutions of its members, and only by insuring that such prosecutions cease may the union vindicate the constitutional interests which it claims are violated. The union stands in the place of its prosecuted members even as it asserts its own constitutional rights. The same comity considerations apply whether the action is brought in the name of the union, and there is no inequity in requiring the union to abide by the same legal standard as its members in suing in federal court. If the union were unable to meet the requirements of *Younger*, its members subject to prosecution would have a full opportunity to vindicate the First Amendment rights of both the union and its members in the state court proceedings. Any other result would allow the easy circumvention of *Younger* by individuals who could assert their claims of First Amendment violations though an unincorporated association of those same individuals if the association is immune from *Younger* burdens.

416 U.S. at 830-31 (footnote omitted).

13. I would agree that under *Doran* and *Steffel* declaratory relief would have been available to the federal-only plaintiffs alone, without their having to survive the pitfalls of a *Younger* analysis, insofar as they asserted rights independent of those directly at issue

II.

Although the majority's position derives no support from *Doran* and *Steffel*, there remains the question of whether the majority's broader policy analysis discloses an adequate basis for the majority's unprecedented extension of *Doran* and *Steffel*. The majority's position could not prevail absent a strong supporting rationale, for in some ways it conflicts with the foundations of *Younger*. If federal intervention were warranted merely because the request for injunctive relief was "pendente lite," then the basic policy behind *Younger* dismissal — namely, to "permit state courts to try cases free from interference by federal courts," 401 U.S. at 43 — would be undermined.

Thus, it is difficult for the majority to derive any support for its position from the assumption that pendente lite Supreme Court review could only be had if the federal plaintiffs were entitled to attack Superior Court Judge Gruccio's order in federal court. All state-court litigants face the same statutory barrier to pendente lite review in the Supreme Court. To argue the

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in the state-court case. *See also* Chase National Bank v. City of Norwalk, 291 U.S. 431, 440 (1934); County of Imperial v. Munoz, 49 U.S.L.W. 4005, 4007 (Dec. 2, 1980) (Blackmun, J., concurring in the result). On this appeal, however, this court affirms only the relief of the district court which directly interferes in the state-court proceeding. *See* majority typescript at 21. At some future time this court may have occasion to recognize the legal significance of the separateness between the interests of Shelton, on the one hand, and the federal-only plaintiffs, on the other. However, this is not such a case. *Cf.* Louisville Area Inter-Faith Comm. for UFW v. Nottingham Liquors, Ltd., 542 F.2d 652, 653 n.* (6th Cir. 1976) (affirming the district court's dismissal of a suit brought by the Committee and two individuals to obtain injunctive relief against a state-court injunction restraining the Committee from mass picketing or marching, the federal-only plaintiffs "have no interests apart from the Committee. In the district court, [they] 'sue[d] on behalf of and as representation for' the Committee, rather than on their individual behalf.").

need for a federal forum from this supposed gap in the Supreme Court's jurisdiction is to deny the soundness of *Doran* itself, which was, after all, a suit in which federal pendente lite relief was denied to M & L.

I will assume, arguendo, that the separate interests of the federal-only plaintiffs might have rendered their advocacy of Shelton's cause somewhat different than Shelton's, although this assumption is not supported by factual findings of the district court. Under this assumption, it is arguably reasonable to credit such parties with a greater need for federal relief on behalf of Shelton than the state-court litigants themselves. Thus this case would present a factor militating in favor of federal intervention not found in *Younger* or in M & L's case in *Doran*. But because the district court's injunction would directly interfere with the pending proceedings in the New Jersey court, the federal relief would be an intrusion on the legitimate function of the state court in deciding the constitutional issues arising out of the cases brought before it.[14] Given this conflict, it is not obvious that the correct result is to afford the aggrieved non-parties to the state-court litigation federal injunctive relief. I conclude that the majority's rationale is insufficient to demonstrate the correctness of that result.

The majority's reasoning, apart from its reliance upon *Doran* and *Steffel*, embraces the following steps: (1) these plaintiffs were entitled to bring a section 1983 action for relief from unlawful state interference with their first amendment rights; (2) there is no reason to believe that the plaintiffs could have asserted that claim by intervening in the Superior Court litigation; (3) thus a separate section 1983 action, in a separate state or federal court, was available for "pendente lite" relief; and

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14. It is undisputed that the state court was presented with essentially all of the claims asserted in the federal complaint, and that it was competent to hear and decide the federal questions arising out of the instant controversy.

(4) the possibility of United States Supreme Court review of preliminary relief awarded in federal district court, as opposed to the impossibility of such review of an interlocutory order of the New Jersey Superior Court, rendered the need for the federal forum "significant, legitimate, even compelling," and unopposed by any legitimate state interest.

The first step in this argument, taken as an abstract desideratum, presents no problems. The last step cannot help the majority, for as we have already seen, it proves too much. Typescript minority op. at 17, *supra*. An additional problem with that step, however, is that it is based on an erroneous assumption concerning the scope of the Supreme Court's jurisdiction under 28 U.S.C. §1257. Just as no petitioner for certiorari can predict with confidence that his case will be heard by the Supreme Court, neither can the majority predict, consistently with its view of the stakes in this case, that the Supreme Court would hold itself statutorily barred from entertaining a request for review of a refusal by New Jersey's appellate courts to reconsider the pendente lite orders of the trial court in this case.

> [T]here are . . . situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been

finally determined by the state courts for purposes of the state litigation.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482-83 (1975). The majority assumes that pendente lite relief is justified because state procedures are inadequate to protect irretrievable first amendment rights of these federal plaintiffs. Where a prior restraint is imposed upon the exercise of first amendment rights, each passing day may constitute a separate and cognizable infringement of the first amendment. To this extent, any first amendment infringement that occurs with each passing day is irreparable. Under such an assumption, the refusal of the state appellate tribunals to mitigate the harm caused by the trial court order is a "final decision" for purposes of 28 U.S.C. §1257. *Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1329-30 (1975) (Blackmun, J., in chambers).[15] Given this finality attending the state court order whose appeal would have been presented to the United States Supreme Court, and given the other circumstances, had the state case been appealed from the New Jersey courts to the Supreme Court, it could have been readily construed to fall within the exception to the finality rule recognized in the above-quoted passage from *Cox*. Therefore, I fail to see any reason why these plaintiffs stood to increase significantly their chances for access to the United States Supreme Court by attacking the Superior Court's order in federal rather than in state court.

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15. *Accord*, New York Times Co. v. Jascalevich, 439 U.S. 1331, 1334 (Marshall, J., in chambers); *cf.* Moreland v. Sprecher, 443 U.S. 709, 711 (1979) (per curiam) (White and Brennan, JJ., dissenting) ("Our cases indicate that the proffered justification for an injunction against publication should be considered and verified or rejected by appellate courts without unnecessary delay."). *See also* New York Times Co. v. Jascalevich, 439 U.S. 1317, 1320-21 (White, J., in chambers). Thus the majority errs in assuming that Supreme Court review of such a restraint is barred for lack of finality. *See* majority typescript op. at 30 n.24.

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I believe that steps (2) and (3) of the majority's argument are similarly flawed. The majority seems to have drawn the conclusion stated in step (2) — *i.e.*, that there is no reason to believe that the federal-only plaintiffs could have intervened in the state proceeding — only by choosing to ignore the rules by which New Jersey courts evaluate applications for intervention. Even if the conclusion stated in step (2) *were* accurate under existing New Jersey law, it would tend to negate, rather than support, the conclusion drawn in step (3) — *i.e.*, that a *separate* 1983 action was necessary and therefore available to protect the federal-only plaintiffs from unlawful interference with constitutional rights.

Initially, I note that had the Superior Court been presented with an application for intervention and had it acted affirmatively, the Board would have been unable to show that Judge Gruccio had committed reversible error in permitting intervention. *See* N.J. Rule 4:33-2 (permissive intervention).[16] The grant of such an application could not have "unduly delay[ed] or prejudice[d] the adjudication of the rights of the original parties," even had it been filed solely for the purpose of challenging Judge Gruccio's immediate restraints on "pure" teaching. The order was not to affect the currently enrolled students until the end of the then-current term, December 22, 1979, or about one month following the date of the injunction. Transcript of Conference before Judge Gruccio, at 12 (Nov. 21, 1979). Given the expected Christmas recess, the effect of the order on actual classroom activities could not have been felt until the begin-

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16. Contrary to the unsupported assertion made in the majority's opinion, typescript at 27 & n.22, the right of the federal-only plaintiffs to participate in the state proceeding is governed by N.J. Rules 1:13-9 and 4:33, and is therefore significantly broader than the right of any private third party to participate in a state criminal proceeding. For in a criminal proceeding, Rule 4:33, a rule of civil practice, would be inapplicable.

ning of the spring 1980 term. Thus there was no particular urgency in the Board's need for state-court relief that would have rendered it impracticable for the Board to defend against any fresh attack to be made by intervenors.[17]

Intervention was thus clearly permissible. More importantly, the churches, the students, the parents and the faculty member also had an absolute right to intervene under Rule 4:33-1 (intervention as of right),[18] to the extent that their interests in the suit were (a) distinct from those of the existing defendants, and (b) affected by the state-court proceeding.[19] Ordinarily such applica-

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17. I do not mean to suggest that it was clearly erroneous for the federal district court to reach the merits on grounds of the exception for "great and immediate" harm to the plaintiffs. Younger v. Harris, 401 U.S. at 46. *See* typescript minority op. at 5 n.8, *supra*. The immediacy of the harm to be suffered by the parties aligned with Shelton was of a different magnitude than the possible prejudicial delay that might have been inflicted on the Board by joinder of additional state court defendants within the brief period before the federal complaint was filed.

18. The rule, entitled "Intervention as of Right," states:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.J. Rule 4:33-1.

19. If I could agree with the majority's interpretation of Testa v. Katt, 330 U.S. 386 (1947), majority typescript at 28, I would conclude that not only the New Jersey Rules, but also the policy of §1983, afforded the federal-only plaintiffs grounds for insisting on the right to intervene. I believe that if federal law obligated New Jersey to provide a state forum to hear their claim, New Jersey would probably obey the federal mandate by allowing intervention, rather than a separate action, because

> [n]o injunction or restraint shall be granted in one action to stay proceedings in another pending action in the Superior Court

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tions are treated liberally at the trial court level. *State v. Lanza*, 39 N.J. 595, 190 A.2d 374, 377 (1963). They cannot be denied on the grounds that the applicant has had sufficient opportunity to protect his rights by actively collaborating with counsel for existing parties. 190 A.2d at 376. "[O]ur courts are firmly committed to the enlightened policy which points generally to the joinder of all matters in controversy between all of the parties in a single proceeding for just and expeditious disposition at one time." *Korff v. G and G Corp.*, 21 N.J. 558, 122 A.2d 889, 893-94 (1956).

If we follow the majority's distinct interest analysis, we are asked to assume the very conclusions that demonstrate the federal-only plaintiffs had an absolute right to intervene in the state court, thus making a collateral forum unnecessary. First, the majority's argument leans heavily on the possible inadequacy of the representation

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. . ., but such relief may be sought on counterclaim or otherwise in the *pending* action.

N.J. Rule 4:52-6 (emphasis added) (contrary to the majority's suggestion, typescript op. at 29 n.23, I can find no support in the New Jersey cases for the blanket statement that Rule 4:52-6 "concerns *claims*, not *parties*." *See* Government Employees Ins. Co. v. Butler, 128 N.J. Super. 492, 320 A.2d 515 (Ch. 1974) (applying Rule 4:52-6 to a claim brought by a separate *party*)). Such a result would guarantee plaintiffs the opportunity to present their claims, as they bear upon the pending state litigation. It would also allow the state court to proceed on the issue before it with full cognizance of the constitutional ramifications of the relief to be ultimately awarded. In this case, of course, the district court reached differing conclusions on the *Younger* considerations applicable to the differing claims of the federal plaintiffs. *See* typescript minority op. at 5 n.8, *supra*. In a case of this sort, the federal and state courts can each decide only so much of the case as it believes properly before it. If each court reaches a different result on the threshold question of which claims it should handle, then a possibility exists that on some claims the two may overlap; other claims may simply fall through the cracks. To allow the additional plaintiffs to intervene in the state suit would avoid the creation of such a judicial vacuum, as well as direct judicial conflict.

by the state-court defendants of the federal-only plaintiffs' separate interests. Thus, under the majority's assumption, the federal plaintiffs fulfill one necessary predicate for obtaining intervention as of right.

Secondly, the standard for demonstrating a "practical impairment," so as to qualify for intervention as of right, is sufficiently liberal to fully guarantee the opportunity for intervention of these plaintiffs in the Superior Court, assuming that such intervention would have been at all meaningful. *See Allan-Deane Corp. v. Township of Bedminster*, 63 N.J. 591, 311 A.2d 177 (1973) (per curiam), rev'g 121 N.J. Super. 288, 296 A.2d 663 (App. Div. 1972).[20]

Thus, contrary to the majority's view, if the federal-only plaintiffs had a legitimate need[21] to challenge Judge Gruccio's order, a forum for such a challenge was available by intervention in the Superior Court proceeding. If New Jersey courts are presumed to evaluate applications for intervention under the applicable laws and precedents of New Jersey, then a conclusion that intervention would have been denied would prove not that a collateral forum was necessary; on the contrary, it would prove that, as a matter of fundamental fairness, availability of a collateral forum was *un*necessary.

Such logic, irreconcilable with that adopted by the majority, is common in decisions found in related areas

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20. It is also worth noting, given the majority's concern that procedural stumbling blocks might prevent the New Jersey appellate courts from correcting any constitutional errors until it is too late, that in *Allen-Deane*, *supra*, both the Appellate Division and the New Jersey Supreme Court immediately heard an appeal from the denial of the application for intervention. *See* Grober v. Kahn, 88 N.J. Super. 343, 212 A.2d 384, 393 (App. Div. 1965) (denial of an application for intervention as of right is a final order) *rev'd on other grounds*, 47 N.J. 135, 219 A.2d 601 (1966); *see generally* 3B *Moore's Federal Practice* ¶24.15 n.4 (1980), and cases cited there.

21. Here I am only borrowing the majority's definition of "legitimate need."

of the law. Unjustified failure to exercise a right to intervene can be grounds for barring any federal collateral attack on a judgment, at least where, as here, the court to which the application should have been addressed retained jurisdiction of the case. *See Black and White Children of the Pontiac School System v. School District of the City of Pontiac*, 464 F.2d 1030 (6th Cir. 1972) (per curiam) (desegration order).[22]

In addition, the very separateness between the interests of prospective intervenors and existing parties that establishes a right to intervene also establishes, in a case such as this, that the prospective intervenors (the federal-only plaintiffs) had little to fear, in the way of direct restraints on themselves, from the entry of the Superior Court's preliminary injunction.[23] The Superior Court order only restrained "the defendants Board of Directors of Shelton College, Glenn Rogers, President of Shelton College, and Carl McIntire, Chancellor of Shelton College" from engaging in any form of educational instruction. Nothing in this order prevents the

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22. This rule finds its most common application in suits which amount to attacks upon consent orders. *See* Oburn v. Shapp, 70 F.R.D. 549 (E.D. Pa.), *aff'd mem.*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); *accord*, Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1052 (3d Cir. 1980); Thaggard v. City of Jackson, 618 F.2d 272 (5th Cir. 1980) (per curiam); Prate v. Freedman, 583 F.2d 42, 46 (2d Cir. 1978).

23. I do not mean to intimate that the federal-only plaintiffs are, for this reason, deprived of standing to obtain separate federal relief. *See* typescript minority op. at 16 n.13, *supra*. My point here is only that the federal-only plaintiffs had no need for a separate forum in which to wage a collateral attack on the order entered by Judge Gruccio.

24. N.J. Rule 4:52-4 provides:

> Every order granting an injunction . . . is binding only upon such *parties to the action* and such of their officers, agents, employees, and attorneys, *and* upon such *persons in active concert or participation* with them as receive actual notice of the order by personal service or otherwise.

churches, parents, students and faculty member from engaging in protected activity — at least, not if, as the majority assumes, their interests can be considered distinct. For distinctiveness of interest is the test by which the perimeter of the injunctive power is defined.[24] Applicants for intervention may succeed by showing that their interests are separate from those of the existing parties, and for this very same reason, they may also show that they cannot be bound by a preliminary injunction in the case in which intervention is sought. *Teamsters Local 523 v. Keystone Freight Lines, Inc.*, 123 F.2d 326, 329-30 (10th Cir. 1941). Even the faculty member, bound by the state-court injunction as an agent of Shelton, was probably not bound if he acted in furtherance of his own first amendment interests. *Cf. Adolph Gottscho, Inc. v. Bell-Mark Corp.*, 79 N.J. Super. 156, 191 A.2d 67, 71 (Ch. 1963) ("An injunction against a defendant which purports to forbid activities he carries on through employees has no bearing upon what an employee can or can not do once the employment ends.").

To assume a distinctiveness between the first amendment interests of the state-court defendants and those of the federal-only plaintiffs may be to prove that these plaintiffs would need a forum to protect themselves if threatened with prosecution. But this very distinctiveness also proves the absence of any need for a separate forum to attack the restraints on Shelton.[25]

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25. I do not mean to suggest that Shelton was not in need of such relief or that the federal court should have remitted Shelton to the state courts for such relief. Of course, had "great and immediate" irreparable harm not been present in this case, even Shelton might have been properly barred from federal relief for failure to exhaust its state-court remedies. Application to the federal courts for relief from unconstitutional state-court orders must be preceded by exhaustion of appellate avenues in the state courts. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); *see* Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977). This Court has held, en banc, that pursuit of

From this I can only conclude that the distinctiveness of interest highlighted by the majority reduces, rather than enlarges, the need for arming these plaintiffs with the federal injunctive weapon to attack the state court's preliminary injunction. I believe that the majority would agree with me that Judge Gruccio's preliminary injunction could not restrain the churches, parents, students and faculty member from gathering on their own initiative and engaging in a joint program of study. Under this view, the prohibition against "pure" teaching activity, which is the only restraint found by the federal district court to contravene the first amendment, could not be enforced against the federal-only plaintiffs.

I conclude that Part IV of the majority's opinion can be supported neither by precedent nor by the weight of its own logic. To paraphrase a recent remark by the Supreme Court, the only remaining basis for Part IV appears to be a generally framed and overbroad principle that every person asserting a federal right arising out of

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discretionary leave to appeal from an interlocutory order of a New Jersey trial court is a prerequisite to satisfaction of this exhaustion requirement. *See* New Jersey v. Chesimard, 555 F.2d 63 (3d Cir. 1977) (en banc). However, these state-court defendants never sought leave to appeal. Moreover, there is no reason to believe on this record that Judge Gruccio would have failed to amend his order so as not to interfere with pure teaching, had the issue been brought to his attention or to the attention of the Appellate Division of New Jersey Superior Court. As I see the record, this issue was actually suppressed by all of the pro-Shelton litigants, in favor of a broad attack on the statutory scheme itself, until the date of the hearing before the federal district court. *See, e.g.*, Transcript of Conference before Judge Gruccio, at 10 (Nov. 21, 1979). ("I do not intend to fashion a remedy which is going to prohibit these young people from continuing the course of study."). Given the duplication of judicial effort that would have followed upon abstention on this issue, given the clearness of the merits of the issue, and given the discretionary factors that enter into the question of whether Shelton's state appellate remedies were "adequate," I see no purpose to be served by now reversing the district court on this issue. *See* typescript minority op. at 5 n.8, *supra*.

interlocutory injunctive relief obtained in a New Jersey state court is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. *See Allen v. McCurry*, 49 U.S.L.W. 4015, 4019 (Dec. 9, 1980).

III.

The state-court enforcement action, and the resulting injunction, gave rise to several constitutional claims. The validity of these claims was affected in varying degrees by questions of New Jersey state law. Moreover, effective protection of the asserted federal constitutional rights required immediate action on some claims, yet not on others. For these reasons the district court was constrained to carefully weave its way among the various claims; and for the most part, it performed its task admirably. I believe, however, that the district court erred in part when it enjoined the defendants from preventing Shelton "from certifying to a student the satisfactory completion of work in a course or other educational activity *through awarding that student a credit therefor*." (Emphasis added.)

I fully approve of the reasoning by which the district court arrived at its conclusion to abstain from deciding some of the constitutional claims addressed by the parties.[26] In particular, the court concluded that if the

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26. Unlike the majority, I cannot subscribe to the proposition that "[o]nce the court has concluded that an immediate dismissal on *Younger* grounds is inappropriate, a motion for preliminary injunctive relief, especially in first amendment contexts, ought, we think, to be considered without regard to the separate question whether a *Pullman* stay of final hearing is appropriate." Typescript at 36. I would agree if the statement were limited to a claim for which *Younger* dismissal is inappropriate due to "great and immediate harm." I would not agree, however, if extended to apply generally to all first amendment cases in which *Younger* dismissal as to some claims is "inappropriate," and preliminary relief is "to be consid-

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Board were simply seeking to prevent Shelton from granting degrees, the prerequisites for *Pullman* abstention would be met:

> First, there are uncertain issues of State law underlying the Federal constitutional claims brought by Shelton College. At this point it is impossible to predict how the New Jersey Supreme Court, the ultimate arbiter of New Jersey law, will interpret the statutes and regulations governing the licensing

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ered." Moreover, to the extent that it suggests that deference to *Pullman* concerns is less appropriate upon entry of a preliminary order than upon entry of a permanent order, the majority inverts the inevitable order of steps in the decision-making process. District Judge Debevoise considered only preliminary relief *because*, among other things, the perceived necessity for *Pullman* abstention prompted him to dispense with any further hearings. *See, e.g.*, Frederick L. v. Thomas, 578 F.2d 513 (3d Cir. 1978) (affirming the district court's mid-litigation decision to abstain on an individual damage claim prior to adjudication of that claim). I am at a loss to understand how the absence of final federal relief in this case renders the considerations expressed in *Pullman* totally inapplicable here.

Similarly, while the presence of first amendment issues can reduce the possibility that *Pullman* abstention will be appropriate, their presence does not obviate the need to consider the policies involved in *Pullman* abstention cases generally. For instance, in Baggett v. Bullitt, 377 U.S. 360, 375-79 (1964), although the Court rejected abstention on grounds that "[t]hose special circumstances" requisite to abstention "are not present here," it also noted that the "piecemeal adjudication in many courts" required by abstention is "a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms." *See generally* D'Iorio v. County of Delaware, 592 F.2d 681, 686, 692 n.19 (3d Cir. 1978). In the present case, on the other hand, the district court found that, as to some of the constitutional claims, the requisite special circumstances *did* exist. 482 F. Supp. at 977. Under such circumstances, it was hardly incumbent upon the district court to consider preliminary relief "without regard" to these "special circumstances."

> of colleges when applied to a religious institution such as Shelton College.
>
> Second, these State law issues could be resolved in a manner that would obviate the need to adjudicate the constitutional claims. After all, Shelton College functioned without difficulty for a number of years when it was licensed under almost identical statutes to grant degrees in New Jersey.
>
> Third, an erroneous decision by this Court of State law might well be disruptive of New Jersey's policies which are implemented by licensing institutions of higher learning.

482 F.Supp. at 977. The court then stated that

> [a]n order will be entered enjoining defendants from taking . . . any action having the effect or designed to have the effect of preventing Shelton College or any of its employees, servants and agents from engaging in any religious, teaching or educational activities or from publicizing or advertising such activities.
>
> Provided that no action is taken in the pending State Court proceeding which would in any way curtail plaintiffs' rights as defined in the order mentioned above, there will be no need to enjoin the prosecution of that proceeding.

Id. at 979.

Although the decision made no mention of the granting of credits, the order that followed enjoined the Board from, among other things, preventing Shelton from awarding "credits" to its students. Because this part of the court's order most probably could not have been justified on the grounds provided for the rest of the

federal injunction, I would reverse, but only as to this part.

The Board has attacked Shelton's degree-related activities for at least two reasons: (a) it objects to the award of degrees in New Jersey; (b) it objects to the award of credits that will be transferred toward a degree to be awarded by an out-of-state institution. One of the Board's methods for attempting to vindicate these interests was to obtain a preliminary injunction against "any form of educational instruction." The propriety of this method was fully reviewed by the district court and held to be so inconsistent with the federal constitution as to call for federal injunctive relief. Another of the Board's methods was to preliminarily enjoin the granting of degrees. This method, said the district court, was not so harmful to the constitutional rights of the federal plaintiffs as to call for such relief.

Prohibition of the granting of degrees satisfied the Board's first objection but not the second. The granting of credits in New Jersey to be used in fulfillment of Florida degree requirements would enable Shelton to circumvent New Jersey's licensing requirements. The question of whether the Board was entitled to regulate the granting of credits to be used for this purpose involved a classical *Pullman*-type question of state statutory construction. The statute provides that "[n]o corporation shall . . . *participate* in conferring a degree" without a license. N.J. Stat. Ann. §18A:68-3 (emphasis added). If this amounts to a prohibition against granting credits upon which an out-of-state institution would grant a degree, then the prohibition against granting credits gives rise to federal questions not unlike the federal questions raised by the degree-granting prohibition. On the other hand, it is possible that a limiting construction of the degree "participation" language, or other aspects of the state licensing scheme, would obviate any constitutional question. Thus, the credit issue was at

least as appropriate for *Pullman* abstention as was the degree-granting issue.[27]

In addition, a potential for great and immediate harm from the state court's preliminary injunction against the award of credits was simply not disclosed in the record below. The district court made no findings at all as to the harm that would ensue from Shelton's inability to award credits, although it was required to do so. Fed. R. Civ. P. 54(a). It did, however, implicitly find that the prohibition on granting degrees did not threaten to "force the disbanding of a community of religious believers." 482 F.Supp. at 977. As the record stands on appeal, I see no reason to believe that the potential for harm resulting from a temporary inability of Shelton to award credits would have been substantially greater than the harm resulting from its temporary inability to award degrees. In the district court's view, the latter was insufficient to override the policies of *Younger*.

For these reasons I conclude that the district court may have abused its discretion when it ordered the Board to allow Shelton to continue to award "credits" to its students. In any case, the court failed to meet the requirements of Rule 52(a), thus depriving this court of an adequate record on which to affirm or reverse this portion of the order. Thus I would vacate only that part of the injunction that allowed Shelton to award credits, and remand for further proceedings not inconsistent with this opinion. *See, e.g., Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940); *FTC v. British Oxygen Co.*, 529 F.2d 196, 200 (3d Cir. 1976) (en banc).

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27. Interestingly, the majority endeavors to address this question of New Jersey law, and does so in such a way as to implicate a federal question. *See* majority typescript op. at 37 n.29. In light of the district court's abstention from addressing this issue, it is surprising that given the policy considerations embodied in *Pullman*, this court would now undertake to address the state-law issue ab initio.

IV.

Accordingly I would affirm the district court's order in granting first amendment relief to plaintiffs, for the reasons carefully set forth by the district court in its opinion, except insofar as its order restrains the state court from barring Shelton in awarding credits to its students. As I have indicated above, I would vacate that part of the district court's injunction that allowed Shelton to award credits. Thus, I join Parts I, III, and VI B of the majority opinion but I do not join Parts II, IV, V and VI A.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1253, 80-1254 and 80-2703

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH; SHELTON COLLEGE, A Ministry of Bible Presbyterian Church; BIBLE PRESBYTERIAN CHURCH OF COLLINSWOOD, NEW JERSEY; KEVIN WILSON, BRAD GSEL, KEVIN CLAIR MICHAEL, CURTIS JORDAN BASHAW, LOUISE OLSON and EVERETTE CHARLES OLSON,

Appellants in Nos. 80-1253 and 80-2703

v.

NEW JERSEY STATE BOARD OF HIGHER EDUCATION; T. EDWARD HOLLANDER, Chancellor of New Jersey Department of Higher Education; RICHARD D. BRESLIN, Assistant Chancellor for Academic Affairs of the New Jersey Department of Higher Education; and AMORITA SUAREZ, Director of the Office for Independent Colleges and Universities of the New Jersey Department of Higher Education,

Appellants in No. 80-1254

(D.C. Civil No. 79-3341)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

EDITOR'S NOTE

PAGES A-162 thru A-198 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Argued: October 16, 1980

Before GIBBONS and ROSENN, *Circuit Judges* and WEBER, *District Judge*

(Opinion Filed April 14, 1981)

ORDER AMENDING OPINION

The slip opinion in the above matter is hereby amended as follows:

Page 7

The reference in line 6 of footnote 5 to the concurring opinion should be to page "60"

Page 17

The case cited in line 16 is "*Prentis v. Atlantic Coast Line Co.*"

Page 19

The reference in line 3 of footnote 16 to the concurring opinion should be to "74-75 n.13"

Page 23

In line 3, substitute "35-37" for "33-35"

Page 25

In line 8, insert "the" between "Holding" and "rights"

Page 27

In the last line of footnote 21, the reference should be to "p. 19"

The reference in the penultimate line of footnote 22 to the concurring opinion should be to "68-69"

Page 35

The reference in the last line of footnote 26 should be to "p. 37"

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*Hon. Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Page 37

In the final line of Part V, delete "obtaining" and insert "enforcing"

Page 40

In the second line of the first full paragraph, insert a comma following "hearing"

JOHN J. GIBBONS

Circuit Judge

Dated: April 21, 1981

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1253, 80-1254, and 80-2703

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH; SHELTON COLLEGE, a Ministry of Bible Presbyterian Church; BIBLE PRESBYTERIAN CHURCH OF COLLINGSWOOD, NEW JERSEY; KEVIN WILSON, BRAD GSEL, KEVIN CLAIR MICHAEL, CURTIS JORDAN BASHAW, LOUIS OLSON, and EVERETTE CHARLES OLSON,

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Appellants in No. 80-1254

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 79-3341

Argued October 16, 1980

Before GIBBONS and ROSENN, *Circuit Judges*, and WEBER, *District Judge**

(Opinion Filed April 14, 1981)

---

*Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

ORDER AMENDING SLIP OPINION

It is ORDERED that the slip opinion in the above be and is hereby amended as follows:

Lines 11-25 of text at page 57, beginning with the words "However, even in," together with the first five lines of text on page 58, constitute a separate paragraph (*viz.*, paragraph 2 of the text of the concurring and dissenting opinion).

Page 58, line 9, insert "V and" between the words "Parts" and "VI A";

Page 59, footnote, line 3, substitute "26 n.22" for "31 n.25";

Page 78, footnote 15, last line, substitute "31 n.25" for "30 n.24";

Page 79, footnote 16, line 2, substitute "27 & n.23" for "27 & n.22";

Page 81, footnote 19, line 4, substitute "29 n.24" for "29 n.23".

BY THE COURT:

MAX ROSENN
Circuit Judge

Dated: April 23, 1981

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1253, 80-1254, and 80-2703

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH; SHELTON COLLEGE, A Ministry of Bible Presbyterian Church; BIBLE PRESBYTERIAN CHURCH OF COLLINGSWOOD, NEW JERSEY: KEVIN WILSON, BRAD GSEL, KEVIN CLAIR MICHAEL, CURTIS JORDAN BASHAW, LOUISE OLSON and EVERETTE CHARLES OLSON,

Appellants in Nos. 80-1253 and 80-2703

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NEW JERSEY STATE BOARD OF HIGHER EDUCATION; T. EDWARD HOLLANDER, Chancellor of New Jersey Department of Higher Education; RICHARD T. BRESLIN, Assistant Chancellor for Academic Affairs of the New Jersey Department of Higher Education; and AMORITA SUAREZ, Director of the Office for Independent Colleges and Universities of the New Jersey Department of Higher Education

Appellants in No. 80-1254

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 79-3341)

Argued October 16, 1980

Before: GIBBONS and ROSENN, *Circuit Judges*, and WEBER, *District Judge**

(Opinion Filed April 14, 1981)

---

*Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

ORDER AMENDING OPINION

It is ORDERED that the slip opinion in the above be and is hereby amended as follows:

At page 78 add the following to footnote 15:

Nor is it possible to assert that reliance on Justice Blackmun's formulation in *Nebraska Press Association*, and the line of subsequent approving opinions, constitutes a "misstatement" of *Cox*, an "amendment" of a federal jurisdictional statute, or a "reading" of §1292(a)(1) "into" §1257—unless perhaps the majority is attempting to express its disapproval of the Supreme Court's interpretation of its own jurisdictional statutes.

However, I believe that my reading of *Cox* is supported by Judge Gibbons' own views on finality as stated in Hoots v. Pennsylvania, 587 F.2d 1340, 1351 (3d Cir. 1978) (Gibbons, J., dissenting). In his *Hoots* dissent, Judge Gibbons stated:

> An order which has the effect of denying all relief for a violation of a constitutional right is a final decision within the meaning of 28 U.S.C. §1291. It is critical, therefore, to examine not only the verbal formula in the order appealed from, but the necessary effect of that order. Thus to some extent the finality and the propriety of the order are interrelated.

587 F.2d at 1352; *see also id.* at 1356 & n.11. Furthermore, the Supreme Court interprets §1257 "consistent with the pragmatic approach that we have followed in the past in determining finality" under §1291. Cox Broadcasting Corp. v. Cohn, 420 U.S. at 486 (citing Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), a case interpreting §1291); *id.* at 478 n.7; *id.* at 502 (Rehnquist, J., dissenting).

Nowhere in San Diego Gas & Elec. Co. v. City of San Diego, 49 U.S.L.W. 4317 (U.S. March 24, 1981) do I perceive any "stress" on the "strictness of the §1257 fi-

nal judgment requirement," alluded to by the majority. Unlike the present case, *San Diego Gas* was a case where further proceedings on disputed fact issues were "necessary to resolve the federal question whether there has been a taking [and thus, a violation of the federal constitution] at all." 49 U.S.L.W. at 4320. Here, on the other hand, both the district court and this entire panel agree that some violation of the first amendment did occur.

BY THE COURT:

MAX ROSENN

Circuit Judge

Dated: May 7, 1981

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX F

Opinion and Order of the United States District Court for the District of New Jersey, dated January 4, 1980

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 79-3341

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYERTIAN CHURCH; SHELTON COLLEGE, A Ministry of Bible Presbyterian Church; BIBLE PRESBYTERIAN CHURCH OF COLLINGSWOOD, NEW JERSEY; KEVIN WILSON, BRAD GSEL, KEVIN CLAIR MICHAEL, CURTIS JORDAN BASHAW, LOUISE OLSON and EVERETTE CHARLES OLSON,

Plaintiffs,

v.

NEW JERSEY STATE BOARD OF HIGHER EDUCATION; T. EDWARD HOLLANDER, Chancellor of New Jersey Department of Higher Education; RICHARD D. BRESLIN, Assistant Chancellor for Academic Affairs of the New Jersey Department of Higher Education; and AMORITA SUAREZ, Director of the Office for Independent Colleges and Universities of the New Jersey Department of Higher Education,

Defendants.

OPINION

DICKINSON R. DEBEVOISE, *District Judge.*

Appearances:

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Haddonfield, New Jersey 08033
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John J. Degnan, Esquire
Attorney General of the State of New Jersey
By: Robert A. Fagella, Esquire,
Deputy Attorney General
Dierdre M. Barz, Esquire,
Deputy Attorney General
State House Annex
Trenton, New Jersey 08625
(Attorneys for Defendants)

Introduction

Shelton College (a religious institution of higher learning), church entities affiliated with Shelton College, Shelton College students and parents, and a Shelton College faculty member seek injunctive and declaratory relief to prevent the New Jersey State Board of Higher Education from requiring Shelton College to comply with New Jersey's statutes and regulations governing the granting of degrees.

Prior to the institution of this action, the State Board of Higher Education instituted suit in the Chancery Division of the Superior Court of New Jersey seeking to enjoin Shelton College from operating until licensed by the State Board. The state court issued a temporary restraining order and then a preliminary injunction which, among other things, enjoined Shelton College and its directors and officers "from engaging in advertising, assisting in or causing the offering of any courses or classes of instruction, or engaging in any form of educational instruction . . . except for presently enrolled students until the conclusion of the academic semester on December 22, 1979, unless a license for same is issued by the New Jersey Department of Higher Education. . . ."

The action is brought under 28 U.S.C. §§ 1331 and 1343; 42 U.S.C. §§ 1983 and 1985; 28 U.S.C. §§ 2201 and 2202. The matter in controversy exceeds the sum of $10,000, exclusive of interest and costs. A judgment is sought declaring that the application to Shelton College of the state licensing and approval scheme contained in N.J.S.A. 18A:3-3, 18A:3-13, 18A:3-14, 18A:68-3, 18A:68-6 18A:68-8 and 18A:68-10 is violative of rights of all of the plaintiffs protected by the First, Ninth and Fourteenth Amendments to the Constitution of the United Staes.

Findings of Fact

I find that the following facts have been established:

1. The Parties Plaintiff:

New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church is the regional ruling body of Bible Presbyterian Church, and consists of ministers and representative elders from Bible Presbyterian Church congregations within New Jersey and Pennsylvania.

Bible Presbyterian Church of Collingswood, New Jersey, is a member congregation of Bible Presbyterian Church.

Bible Presbyterian Church is a fundamentalist Chistian church with a nationwide membership. It conducts educational ministries for the sole and ultimate purpose of spreading its religious beliefs. In keeping with this practice, the plaintiffs, New Jersey-Philadelphia Presbytery and Bible Presbyterian Church of Collingswood, have sponsored, as an integral part of their religious mission, plaintiff, Shelton College, a New Jersey corporation which has its campus in Cape May. The Presbytery's sponsorship has taken the form of (a) formal approval of the college, pursuant to ecclesiastical procedures, as an "agency" of the denomination, and (b) financial support. Sponsorship by the Bible Presbyterian Church of Collingswood has taken the form of financial support.

Shelton College is an outgrowth of the National Bible Institute founded in 1907 to train "Christian Warriors". It is a small institution presently numbering only thirty students, but for several decades it has been the prin-

cipal source of this denomination's seminarians who are educated for the ministry and other church missions at Faith Seminary in Pennsylvania.

Shelton College purports to award Bachelors' degrees in the Arts, Sacred Theology, Christian Education and Sacred Music. It receives no local, state or federal funds due to the beliefs of Bible Presbyterian Church respecting the separation of church and state.

Plaintiffs Wilson, Gsell, Michael and Bashaw are full-time students at Shelton College who profess to be "born again" Christians of fundamentalist Christian faith and who have elected to attend the college and wish to continue their education there by reason of their religious convictions.

Plaintiffs Everette Charles Olson and Louise Olson, his wife, are the parents of Corrine Olson, a sophomore presently a student at Shelton College, Ken Olson, a 1979 graduate of Shelton College, and Claudia, a tenth grade high school student who hopes to attend Shelton College. These parents believe that Shelton College is an institution of post-secondary education which fulfills the religious and moral goals which they desire for their children. Unlike many institutions of higher learning which are church-related but which are now virtually indistinguishable from purely secular institutions, Shelton College remains totally oriented to its religious beliefs and practices.

Plaintiff Everette Charles Olson is also a professor of mathematics and chemistry at Shelton College. He serves as a full-time faculty member at the College and is a practicing member of Bible Presbyterian Church and a "born again" Christian. He pursues his work as a religious ministry.

2. The Parties Defendant:

Defendant New Jersey State Board of Higher Education is the supervisory body of the Department of Higher Education of the State of New Jersey.

Defendant T. Edward Hollander is Chancellor of the New Jersey State Board of Higher Education and serves as its chief executive officer.

Defendant Richard D. Breslin is Assistant Chancellor for Academic Affairs of the Department of Higher Education of the State of New Jersey and is responsible for the licensing and approval of institutions of post-secondary education in the State of New Jersey.

Defendant Amorita Suarez is the Director of the Office for Independent Colleges and Universities of the Department of Higher Education of the State of New Jersey, which is responsible for processing and approving applications for licensing of institutions of higher learning for the State of New Jersey.

3. The Contested Statutes:

Shelton College does not possess a license from the State of New Jersey authorizing it to confer degrees, and in this action plaintiffs seek a judgment declaring the application of the State licensing and approval scheme as applied to Shelton College to be violative of their rights protected by the First, Ninth and Fourteenth Amendments of the United States Constitution.

The Board of Higher Education has the duty of general supervision of higher education in the State of New Jersey pursuant to N.J.S.A. 18A:3-1, *et seq.*, and N.J.S.A. 18A:68-1, *et seq.*

N.J.S.A. 18A:68-3 provides that "No corporation shall furnish instruction or learning in the arts, sciences or professions for the purposes of admitting any person to the grade of a degree, or shall confer or participate in conferring a degree, giving to any person a diploma of graduation or of proficiency in a course of study, in learning, or in scientific arts or methods, within this state, until it shall have filed a certified copy of its certificate of incorporation with the board of higher education and obtained from such board a license to carry on the business under such rules as the board of higher education may prescribe."

If an institution carries on the business of such instruction or teaching or confers any such degree without a license issued under this statute, the Board of Higher Education is authorized to bring a civil action in the Superior Court to restrain the institution from engaging in such activity until it has obtained a license or the approval of the Board of Higher Education. N.J.S.A. 18A:68-5.

If an institution or any of its officers confer or participate in conferring any degree upon a student contrary to the provisions of N.J.S.A. 18A:68-1, *et seq.*, or sign any certificate or diploma as evidence of the conferring of a degree, the institution or such officers may be fined not more than $300 for each offense. N.J.S.A. 18A:68-9. Failure to pay this penalty will result in commitment to a county jail for a period not exceeding ninety days. 18A:68-10.*

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* The statutes have been implimented by detailed regulations which set forth the procedures by which a college can be licensed. N.J.A.C. 9:1-1.1, *et seq.* An applying institution must furnish extensive information about its administrative organization, finances, educational programs, faculty, library, students, student services and physical facilities.

4. Prior Litigation:

More than a decade ago Shelton College instituted an action in the State courts attacking the constitutionality of the statute relating to the granting of baccalaureate degrees, *Shelton College* v. *State Bd. of Ed.*, 48 N.J. 501 (1967). The action was commenced by an appeal to the Appellate Division of the Superior Court from resolutions of the State Board of Education which set a cutoff date after which the College could not confer degrees. The reason for the action of the Board was that the College had not met the State's licensing requirements. The New Jersey Supreme Court certified and thereafter heard the case.

The grounds for the attack on the licensing statute were (i) it is beyond the power of the government to regulate in any way the awarding of a Bachelor's degree because of the right of free speech guaranteed in the Constitutions of the United States and New Jersey: (ii) the statute fails to set forth a sufficient standard for the exercise of the legislative power delegated to the State Board in violation of the State Constitution: (iii) the statute creates an unconstitutional classification in that it exempts colleges which had the power to confer the degree twenty-five years before the enactment of the statute: and (iv) the Board has no power to condition approval upon terms to be met and thus to subject the approval upon annual decisions as to whether it should be withdrawn for failure to meet the terms.

It should be noted that the record in that case consisted only of the notice of appeal and the two resolutions of the State Board of Education. There was nothing in the record setting forth the nature of Shelton College as a religious institution.

There are no significant differences for present purposes between the statute under review in *Shelton College* v. *State Bd. of Ed., supra,* and the statute at issue in the present case.

In the opinion in that case, written by Chief Justice Weintraub, the Court reviewed with great care the history of legislation requiring State Board licensing of degree-granting institutions of higher learning. The Court upheld the statute, ruling against the College on all of its grounds of invalidity. In view of the relief which the defendants seek in their pending action in the New Jersey courts described hereinafter, it is important to note what the Court did and did not decide in the *Shelton College* case. It upheld the power of the State Board to refuse to license Shelton College to grant degrees, and presumably it would have upheld action of the State designed to prevent the College from granting the kinds of degrees traditionally subject to State regulation. It did not and was not asked to forbid Shelton College from teaching.

A close reading of the case leads to the inescapable conclusion that the Court intended to approve regulation of the awarding of the Bachelor degree, or other recognized degrees, and nothing more. It stated, "And it is the degree, evidential as it is of academic attainment, which especially is an appropriate object of regulation." (48 N.J. at 511), and it quoted Elliott, *The Colleges and the Courts* (1936), for the proposition that "The power to confer academic degrees is to be regarded as distinct and separate from the privilege of being incorporated as an educational institution." The Court stated: "It should be noted that the resolution in ques-

tion does not limit in any way what Shelton may teach. Rather the resolution concerns the power to confer the bachelor degree." 48 N.J. at 509.

The Court explicitly rejected Shelton College's contention that the statutory power to regulate the granting of a degree carried with it the power to destroy religious or free-speech rights being exercised by an institution of higher learning, stating: "Of course the power to regulate does not depend upon a power to destroy. If government were denied the power to regulate unless it could also prohibit, there could hardly be law and order. Our statutes abound with needful restrictions upon rights of the person and of property notwithstanding the Constitution would protect those rights from destruction. Rather the Constitution condemns such exercises of the police power as are arbitrary, and leaves it to its constituted officers to say when the boundaries of that power have been breached." At 515, 516.

Thus the *Shelton College* case holds only that New Jersey may forbid a college to grant a recognized degree without State licensing. It may be fairly implied from the opinion of the Court that the State has no power under the applicable statute to order an educational institution, religious or secular, to stop teaching.

5. Background Facts:

In 1971, after the *Shelton College* decision and the conclusion of certain other litigation involving the College (*In Re Shelton College*, 109 N.J. Super. 488 (App. Div. 1970)), the State Board of Higher Education revoked the temporary license to confer degrees in New Jersey which it had previously awarded to Shelton College.

In about September 1971, Shelton College began operating in Cape Canaveral, Florida, as a licensed educational institution in that state.

In February of 1979, Shelton College submitted an application to the New Jersey State Board of Higher Education seeking a license once again as a degree-granting institution in this state. Authorization was sought to grant a Bachelor of Arts degree and degrees in the areas of Biblical Literature, Christian Education, Elementary Education, Secondary Education, English, History, Business Management, Music Education and Natural Science.

Defendant Amorita Suarez, Director of the Office of Independent Colleges and Universities, Department of Higher Education, started processing the Shelton College application. In an affidavit filed in the state court proceedings, she stated she informed Shelton College it must obtain a license "before it could offer any instruction which in any manner would result in the award of credits or degrees". However, a letter to the College from defendant Richard D. Broslin, Ph.D., Assistant Chancellor of Academic Affairs, Department of Higher Education, stated that: "no educational activities may take place in New Jersey prior to Board approval."

Thus whether or not Shelton intended to grant degrees, a State official forbade it to teach anything for any purpose unless it had Board approval.

In July 1979, Ms. Suarez learned that Shelton College intended to offer courses of instruction in New Jersey in the fall of 1979 and grant degrees to students through its Florida affiliate. In the summer or fall of 1979, Shelton College in fact commenced a teaching program in New Jersey.

On October 19, 1979, Ms. Suarez went to Shelton College's facilities at Cape May, New Jersey, and was met with the following sight: "young people walking about the facility carrying books, and studying in the library". [Suarez affidavit, paragraph 10.]

On the basis of this frightening observation, she informed the College's president that the College was operating in violation of New Jersey law. She was unable to ascertain from Shelton College officials whether it intended to grant credits for degrees either in New Jersey or Florida, but she did ascertain from a Florida official that the College had requested permission to grant credits and degrees in Florida for instruction offered in New Jersey.

It was the State Board's position that "no aspect of the educational process may take place at Shelton College in New Jersey until the license application is fully evaluated and approved". [State Board's Complaint in the State Court action, paragraph 13.]

Alerted to Shelton college's teaching activities and acting pursuant to N.J.S.A. 18:68-5, the State Board instituted proceedings in the Chancery Division of the Superior Court of New Jersey. The relief sought included judgment "enjoining and restraining all defendants and their employees, servants and agents from engaging in, assisting in or causing the offering of any courses or classes of instruction, or engaging in any form of educational instruction, or offering or providing any credits, awards, certificates or degrees for any such instruction or educational experience which has been given to any enrolled student or other individual since September 1, 1979 in or about the property of Shelton College in Cape

May, New Jersey, until a license for same is issued by the New Jersey Department of Higher Education".

The complaint was filed on November 15, 1979. A temporary restraining order was entered by the Court which enjoined all educational or instructional activities of Shelton College. Excepted from the order was instruction for students then attending the College until the end of the academic semester on December 22, 1979.

On November 19, 1979, plaintiffs commenced the instant action in the Federal Court and sought a temporary restraining order enjoining application of the State licensing statutes to Shelton College and staying the State Court proceedings. This Court declined to issue the temporary restraints and stay, but set the matter down for a prompt hearing on plaintiffs' application for a preliminary injunction.

In the meantime, the State Court issued a preliminary injunction which in effect continued the total prohibition against "advertising, assisting in or causing the offering of any course or classes of instruction or engaging in any form of educational instruction except until December 22, 1979, with respect to currently enrolled students unless a license for same is issued by the New Jersey Department of Higher Education". Shelton College was also ordered to "cause every student presently enrolled in Shelton College to be notified of the terms of the order."

Prior to the Federal Court hearing and plaintiffs' application for a preliminary injunction, defendants moved to dismiss all claims and allegations contained in the complaint on the grounds that (i) the complaint failed to state a claim upon which relief can be granted, and

(ii) plaintiffs are barred by the doctrines of abstention, ripeness, *res judicata* and collateral estoppel. A hearing was held on plaintiffs' application and on defendants' motion.

At the hearing plaintiffs called as witnesses students attending Shelton College, parents of Shelton College students and faculty members. It also called various church officials. Most of these people were members of the Bible Presbyterian Church. Some were members of other conservative Protestant denominations, such as the Independent Baptist Church or Mennonite Church. Although these churches may differ in ceremonial practices and forms of church government, they all share the same central theological beliefs and codes of personal conduct.

Central to their beliefs is their conviction that the Bible is the infallible, inerrant Word of God which provides guidance for every phase of life. They believe in the fallen nature of man, that by reason of his sinful nature man cannot (as the "humanist" would contend) achieve his own Utopia or salvation, that man can be saved only by the substitutionary sacrifice of Jesus and the acceptance of that sacrifice by the believer.

For these persons there are no areas of life which are not governed by their Biblical faith, whether it be their personal conduct, their vocations or the subjects they teach. Both the students and the teachers who testified believe that their presence at Shelton College is for the purpose of preparing themselves or others to perform the missions their Lord calls upon them to perform.

Several of these students could have attended recognized secular colleges and universities had they chosen

tc do so. The teachers work at Shelton College at considerable financial sacrifice to themselves.

When students attend Shelton College, they accept a strict code of conduct embodied in their Student Handbook (Exhibit P-1). This includes dress codes, compulsory chapel four days a week, refraining from studying, swimming, sun-bathing and athletics on Sundays, refraining from the possession or use of alcoholic beverages, tobacco, non-medicinal narcotics or hallucinogenic drugs and marijuana, and avoiding modern dance, commercial movies and rock and roll music. There is strict regulation of dating, engagements and marriage.

Every academic subject is taught from a perspective of the religious point of view of the fundamentalist denominations, whether it be history, art, economics, chemistry or English literature. The conduct and beliefs of the Shelton student and the theological doctrines which form the content of the academic program are at total variance from secular and most church-sponsored colleges and universities. This is the reason why the students have selected Shelton College, why the parents wish their students to attend, and why the faculty members teach there. They seek the nurture and fellowship of a community of the faithful, where they can develop their understanding and knowledge of their own faith, and where they can prepare to propagate it in the world at large.

The order secured by the State Board of Higher Education requires that on December 22, 1979, Shelton College, the core of this community of believers, must cease teaching. By state dictat a religious community will be destroyed.

Plaintiffs seek the aid of the Federal Court to protect their religious and other constitutional rights.

Conclusions of Law

These proceedings present the following legal issues:

(i) May the New Jersey State Board of Higher Education order a church-oriented college, which has not obtained a State degree-granting license, to cease advertising and to halt all teaching activities?

(ii) If it is concluded that the State Board may not issue or obtain such an order, may it issue an order forbidding a church-oriented college from granting one of the recognized forms of degrees until it is licensed in the manner required by the State, notwithstanding the fact that administration of the licensing statutes and regulations will require the State to involve itself to an as yet undetermined extent in the affairs of the college?

(iii) If it is concluded that the State Board may require a church-oriented, New Jersey college to be licensed under State law before it may grant one of the recognized degrees, may the Board lawfully, under the United States Constitution and the applicable New Jersey statutes, forbid that college to award degrees pursuant to licensing procedures of another state?

(iv) Finally, accepting that the Court has undoubted jurisdiction of this case under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. §§ 2201 and 2202, should the Court hear the matter in light of the fact that prior to the commencement of this action the State Board of Higher Education instituted a proceeding in the State Courts in which the same issues can be raised?

1. Whether the Court should hear the case:

If under prevailing law the Court should decline to hear this case, there would be no need to address the first three legal issues, and, therefore, the Court's authority to hear the case will be considered first.

The defendants advance two preliminary reasons why the complaint should be dismissed without consideration on the merits. They argue that the injuries alleged by plaintiffs are purely hypothetical and do not present a case or controversy, requiring dismissal of the complaint under the principles set forth in *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947). They also argue that the same issues which plaintiffs raise in this case were raised or could have been raised in *Shelton College* v. *State Bd. of Ed.*, *supra*, and that, therefore, plaintiffs are barred from relitigating them in the present action.

Neither point is well-taken. As far as each plaintiff is concerned, the constitutional issues presented are not abstractions. They have immediate, concrete impact upon them. There is nothing hypothetical about the fact that if defendants' actions stand: (i) the church entities will lose a college which they have sponsored: (ii) the college itself will be closed, perhaps forever, and effectively prevented from teaching its doctrines and its version of the liberal arts and natural sciences: (iii) the student plaintiffs will be unable to attend an institution, the teachings of which are in accord with their beliefs and which constitutes a community of believers whose ways of life are different from those of students attending secular colleges; (iv) the parent plaintiffs will no longer have available a college at which their children can be educated in an environment which is compatible with their reli-

gious beliefs; and (v) the teacher plaintiff will lose the institution at which he can teach in accordance with his faith.

For these people the threat is far from speculative. If the preliminary injunction issued by the State Court stands, on December 22, 1979, all of those events will take place, and all of those injuries will have been incurred.

As for the defendants' *res judicata* and collateral estoppel contentions, while it is clear that even in a § 1983 Civil Rights case the doctrines may bar relitigation in a Federal Court of issues already decided in a State Court, *Roy* v. *Jones*, 484 F.2d 96 (3d Cir. 1973), these doctrines do not affect the present case.

In the first place, in the *Shelton College* case, the New Jersey Supreme Court did not have occasion to address the first and third legal issues recited above, namely, whether the State Board can compel Shelton College to stop teaching and advertising and whether Shelton College can grant degrees under a Florida license. They simply were not issues in that case. In fact, a fair reading of the 1976 case compels the conclusion that the New Jersey Supreme Court was of a view that the State Board's power was limited to licensing or not licensing a college to grant degrees, and that the Board does not have the power to order any institution to stop teaching, an order which would offend every constitutional concept of free speech. The 1967 case involved very different facts and very different claims.

Further, the plaintiffs in the 1967 New Jersey case and in the present case are different. Only Shelton College was a plaintiff in the earlier matter. In the matter at hand, there are also church bodies, students, parents and

a teacher, each asserting important constitutional rights of which they cannot be deprived by reason of a ruling in a case to which they were not parties and in which they had no opportunity to be heard. *Parklane Hosiery Co.* v. *Shore*, 47 U.S.L.W. 4079 (1979); *see New Jersey Ed. Ass'n.* v. *Burke*, 579 F.2d 764, 774 (3d Cir. 1978), *cert. denied*, 439 U.S. 894 (1978).

Thus plaintiffs are not barred in this proceeding by the doctrines of *res judicata* and collateral estoppel.

The State Board also urges that this action should be dismissed as a matter of comity and in recognition of principles of federalism since there is a pending State Court proceeding started before this action was commenced in which the issues raised here can be resolved. *Younger* v. *Harris*, 401 U.S. 37 (1971).

The State Board further urges that this matter should be dismissed or at least held in abeyance because a constitutional issue may depend upon a State court's interpretation of the licensing statutes and thus the State courts should resolve those interpretive questions before this Court acts. *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941).

In arguing this position, the State Board has presented a contrived description of what this case is all about. It proceeds on the assumption that the only substantive issue before the Court is legal question No. 2 set forth above: Whether the State Board may forbid a church-oriented college from granting a degree. For example, the State Board brief defines the situation as follows:

> It must be kept in mind that the degree-granting privilege is the only basis for the State's exercise of any authority over the college. *See* NJSA 18A:

> 68-3; NJSA 18A:68-6. The Board of Higher Education does not contend that it may prevent Shelton College, or any other religious institution, from disseminating its religious beliefs or from educating its younger generation. It is only when that educational process results in the granting of a degree in which the State can legitimately assert genuine secular concerns that the responsibility of the State to protect the public interest is invoked. (P. 5.)

Of course, this is not the situation presented to this Court. The State Board not only seeks to forbid the granting of degrees, it seeks to stop all teaching at Shelton College and to prevent the College from informing its co-religionists and others about the existence and purposes of the College. Already the College has been forbidden to advertise itself, an appalling infringement of free speech, and, unless the Court acts, on December 22, 1979 the College, its teachers and its church sponsors will be forbidden to teach, an appalling infringement of the rights of free speech and the free exercise of religion.

I have concluded that this case in part is within the exceptions of the *Younger* and *Pullman* doctrines. However, an analysis of defendants' position, assuming their portrayal of the case were accurate, would be useful in explaining the relief which will be ordered at the conclusion of this proceeding. If one were to accept the State Board's contention that all that is involved in this case is a question whether the State Board has the power to license Shelton to grant degrees and if there were no attempt to shut down this teaching institution, it is my opinion that both the *Younger* and the *Pullman* doctrines would be applicable.

It is the plaintiffs' fundamental position in this case that Shelton College, a religious institution, cannot be made subject to the degree licensing requirements of the New Jersey statutes and regulations. They argue, with some persuasiveness, that implementation of those statutes and regulations involve the State so extensively in religious matters that the First and Fourteenth Amendments' free speech and free exercise of religion rights are unconstitutionally impaired, citing such cases as *Catholic Bishop of Chicago* v. *NLRB*, 559 F.2d 1112 (7th Cir. 1977), aff'd 47 U.S.L.W. 4283 (1979); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Grace Brethren Church, et al.* v. *State of California, et al.*, —— F. Supp. —— (Sept. 21, 1979); *Caulfield* v. *Hirsch*, 95 L.R.R.M. 3164 (E.D. Pa. Civ. No. 76-279, 1977).

Plaintiffs thus seek protection in the Federal Courts of rights asserted under the United States Constitution, as they are entitled to do under § 1983. When a plaintiff asserts rights under that statutory provision, a court is not barred by 28 U.S.C. § 2283 from enjoining state court proceedings if such an injunction is necessary to secure such rights. *Mitchum* v. *Foster*, 407 U.S. 225 (1972). However, even though a Federal Court is not deprived of jurisdiction to issue an injunction in such a case, it is still required to consider "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding". 407 U.S. at 243.

The State Board in the present case instituted its proceedings in the State Courts before plaintiffs came into this Court. The constitutional questions which plaintiffs

raise here can be raised in the State Court. Although *Younger* counsels Federal Court abstention when there is a pending state *criminal* proceeding, the line of cases which has followed *Younger* compels the conclusion that a Federal Court must also abstain when there is pending a state *civil* proceeding in which the state has an important interest. This line of cases is traced in detail in the most recent of such Supreme Court cases, *Moore* v. *Sims*, 47 U.S.L.W. 4693, 4695 (1979).

That being the state of the law, if the State Board were doing no more than simply suing in the State Courts to prevent Shelton College from granting degrees until it qualifies for a license, this Court should abstain on the authority of *Younger* and its progeny, e.g., *State of N.J.* v. *Chesimard*, 555 F.2d 63 (3d Cir. 1977).

Turning to the *Pullman* doctrine, in the normal case, a Federal Court should refrain from deciding Federal constitutional issues until related state court issues have first been adjudicated in the state courts. Again, if the State Board were doing nothing more than seeking to prevent Shelton College from granting degrees, the criteria which the Court of Appeals for the Third Circuit has held bring the *Pullman* doctrine into play would exist. *D'Iorio* v. *County of Delaware*, 592 F.2d 681 (3d Cir. 1979).

First, there are uncertain issues of State law underlying the Federal constitutional claims brought by Shelton College. At this point it is impossible to predict how the New Jersey Supreme Court, the ultimate arbiter of New Jersey law, will interpret the statutes and regulations governing the licensing of colleges when applied to a religious institution such as Shelton College.

Second, these State law issues could be resolved in a manner that would obviate the need to adjudicate the constitutional claims. After all, Shelton College functioned without difficulty for a number of years when it was licensed under almost identical statutes to grant degrees in New Jersey.

Third, an erroneous decision by this Court of State law might well be disruptive of New Jersey's policies which are implemented by licensing institutions of higher learning.

The fact of the matter is, however, that the State Board is not simply seeking to deny Shelton College the right to grant degrees. It is seeking as of December 22, 1979, to prevent Shelton College from engaging in any teaching activities whatsoever. It is seeking to force the disbanding of a community of religious believers who have assembled to teach and study in accordance with their faith and conduct their lives as required by that faith. This places the situation within an exception to the *Younger* doctrine and it requires a Federal Court to decline to invoke the *Pullman* doctrine upon equitable principles.

The United States Supreme Court has consistently recognized that the *Younger* doctrine of abstention will not be applied in extraordinary circumstances where there will be great, immediate and irreparable harm if the Federal Court does not intervene. *Moore* v. *Sims, supra; Kugler* v. *Helfant,* 421 U.S. 117 (1975); *Huffman* v. *Purse, Ltd.,* 420 U.S. 592 (1975).

In the case of the *Pullman* doctrine, once it is determined that the case is within the general ambit of the doctrine, a weighing process must take place to deter-

mine if the doctrine should be applied. *Frederick L.* v. *Thomas,* 578 F.2d 513, 517 (3d Cir. 1978). As will be discussed below, the rights which the proposed action of the State Board would destroy are so important and the threatened injury to those rights so irretrievable, the *Younger* and *Pullman* doctrines must give way.

2. The Power of the State Board to Prohibit Shelton College to Teach:

We now turn to the first question of law set forth earlier, whether the State Board may compel Shelton College to cease advertising and teaching.

Highest in the pantheon of civil rights guaranteed by the United States Constitution are the right to be free of laws prohibiting the free exercise of religion or abridging freedom of speech. The degree of protection to which these rights are entitled was spelled out in detail in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972).

There, in violation of Wisconsin's compulsory school attendance laws, which required a child's school attendance until age 16, members of the Conservative Amish Mennonite Church withdrew their children from public schools at age 14 and educated them in accordance with their beliefs and practices. Notwithstanding the substantial State interest in the secondary education of its children, the United States Supreme Court held that application of the law to that religious sect violated the sect's rights under the Free Exercise Clause of the First Amendment made applicable to the State by the Fourteenth Amendment.

The State of New Jersey has far less interest in regulating the colleges attended by young persons who have

passed the age of compulsory school attendance. The following quotations from *Yoder,* therefore, apply with even greater force to Shelton College and the actions which the State Board seeks to take.

> Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce,* made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. [Citations omitted.] Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce,* 'prepare [them] for additional obligations'. At 213.
>
> . . . we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately re-

lated to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world . . .' This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community. At 216.

Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that 'actions', even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. At 219, 220.

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim: despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would

> flow from recognizing the claimed Amish exemption. At 221.
>
> We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong'. A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different. At 223.

In the present case, the State of New Jersey has no interest comparable to that of Wisconsin in the *Yoder* case. Its interest as defined in the 1967 *Shelton College* case is to protect "the integrity and value of the bachelor degree", 48 N.J. at 517, an interest which can surely be protected without trampling upon and extinguishing the rights of free speech and free exercise of religion.

Surely neither *Younger* nor *Pullman* nor their descendants prevent a Federal Court from acting pursuant to its unquestioned § 1983 powers to prevent such acts by a State Court.

3. The Relief to be Granted:

I conclude that plaintiffs have every likelihood of prevailing on the merits insofar as the State Board seeks to close Shelton College by forbidding it to advertise and teach, that all of the plaintiffs are threatened with immediate and irreparable injury to their rights of free speech and right to freely exercise their religion, that

none of the other parties to this action are prejudiced in any way by Shelton College's continued operation, and that all members of the public at large will ultimately benefit if the constitutional rights of a small religious minority are protected from encroachments by honorable but overly zealous public officials. Preliminary injunctive relief is appropriate.

An order will be entered enjoining defendants from taking or permitting the taking of any action having the effect or designed to have the effect or preventing Shelton College or any of its employees, servants and agents from engaging in any religious, teaching or educational activities or from publicizing or advertising such activities.

Provided that no action is taken in the pending State Court proceeding which would in any way curtail plaintiffs' rights as defined in the order mentioned above, there will be no need to enjoin the prosecution of that proceeding. It is presumed that the outstanding preliminary injunction in the State action will be modified appropriately to reflect the mandate of the preliminary injunction entered in this case. If so, that action may proceed to a determination of the State Board's power or lack of power to grant or deny Shelton College the right to award recognized academic degrees, and plaintiffs will have the opportunity there to raise all the constitutional contentions involved in the second and third legal issues set forth above.

Upon the granting by this Court of preliminary injunctive relief which will prevent the immediate irreparable violation of plaintiffs' constitutional rights, it will then be appropriate to apply the *Younger* and *Pullman*

doctrines. So long as there is no interference with Shelton College's religious, teaching or educational programs, this Court should abstain from deciding the remaining constitutional issues and permit them to be resolved in the first instance in the pending State Court action. This Court will retain jurisdiction pending completion of the State Court proceedings in the event further interim relief should be required.

Defendants' motion to dismiss is denied, and plaintiffs are requested to submit an order in accordance with this opinion and the applicable Court Rules.

DICKINSON R. DEBEVOISE
United States District Judge

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No. 79-3341

(Filed—January 4, 1980)

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYERTIAN CHURCH; SHELTON COLLEGE, A Ministry of Bible Presbyterian Church; BIBLE PRESBYTERIAN CHURCH OF COLLINGSWOOD, NEW JERSEY; KEVIN WILSON, BRAD GSEL, KEVIN CLAIR MICHAEL, CURTIS JORDAN BASHAW, LOUISE OLSON and EVERETTE CHARLES OLSON,

Plaintiffs,

v.

NEW JERSEY STATE BOARD OF HIGHER EDUCATION; T. EDWARD HOLLANDER, Chancellor of New Jersey Department of Higher Education; RICHARD D. BRESLIN, Assistant Chancellor for Academic Affairs of the New Jersey Department of Higher Education; and AMORITA SUAREZ, Director of the Office for Independent Colleges and Universities of the New Jersey Department of Higher Education,

Defendants.

ORDER

Based upon the findings of fact and conclusions of law contained in the Opinion of the Court as pronounced December 14, 1979,

IT IS ORDERED that

The defendants are enjoined from taking, or permitting the taking of, any action having the effect of, or designed to have the effect of, preventing Shelton College or any of its servants, employees or agents

(a) from engaging in any educational activities or in any religious teaching;

(b) from publicizing or advertising such activities,

(c) from certifying to a student the satisfactory completion of work in a course or other educational activity through awarding that student a credit therefor.

IT IS FURTHER ORDERED, that defendants' motion to dismiss the complaint is denied.

DICKINSON R. DEBEVOISE, J.

APPENDIX G

18A:3-3. Powers and duties

The department shall, in addition to other powers and duties vested in it by this chapter, or by any other law:

a. Assist in the coordination of state and federal activities relating to higher education;

b. Advise and inform the governor on the affairs and problems of higher education and make recommendations to the governor for proposed legislation pertaining thereto;

c. Stimulate programs relating to higher education through publicity, education, guidance and technical assistance concerning federal and state programs;

d. Encourage cooperative programs by institutions of higher education;

e. Maintain an inventory of data and information and act as a clearing house and referral agency for information on state and federal services and programs;

f. Exercise all the functions, powers and duties formerly exercised by the department of education pertaining to higher education and the jurisdiction, supervision and control of institutions of higher education and transferred to the department of higher education as of July 1, 1967 by chapter 302 of the laws of 1966 except such as are inconsistent with the specific provisions of this law; and

g. Exercise all of the duties, functions and powers formerly exercised by the department of education pertaining to Rutgers, the state university, and pertaining to the Newark college of engineering and

transferred to the department of higher education as of July 1, 1967 by chapter 302 of the laws of 1966[1] and notwithstanding the provisions of any other section of this chapter the department of higher education shall have no duties, functions and powers with respect to either of these institutions except such as were so transferred.

18A:3-13. General supervision of higher education

It shall be the duty of the board of higher education to advance long-range planning for the system of higher education as a whole in the state; establish general policy for the governance of the separate institutions; coordinate the activities of the individual institutions which, taken together, make up the system of higher education in New Jersey; and maintain general financial oversight of the state system of higher education. The board shall not administer the individual institutions of higher education, its own administration being specifically reserved unto each of such institutions.

Within the limitations imposed by general legislation applicable to all agencies of the state and the provisions of this chapter, the board is hereby granted exclusive jurisdiction over higher education in this state and its constituent parts and the requisite power to do all things necessary and proper to accomplish the aims and carry out the duties provided by law.

18A:3-14. Powers and duties

The Board of Higher Education shall:

a. Conduct research on higher educational needs;

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1. Section 18:21A-1 et seq. (see schedule A, allocaiton of source material).

b. Develop and maintain a comprehensive master plan which shall be long range in nature and be regularly revised and updated;

c. Establish new colleges, schools, units, divisions, institutes, departments, branches, campuses, as required by the master plan, provided that provision is made therefor in the annual or a supplemental or special appropriation act of the Legislature or otherwise;

d. Establish minimum admission standards for all public institutions of higher education, except that nothing in this chapter shall be construed to prevent individual institutions from establishing higher minimum admission requirements;

e. Establish minimum standards for all public institutions of higher education for degree granting, approve new programs and degrees and approve discontinuance of degrees and educational programs as required. Nothing, however, in this law shall be construed to prevent individual institutions from establishing higher minimum standards for degree granting. "Programs" as used in this subsection means areas or fields in which degrees or nondegree certificates might be granted and shall not include individual courses for course content nor shall it include the course composition of areas or fields already in existence;

f. Receive all budget requests from the institution, coordinate and balance such requests, and submit a combined request for appropriations annually to the Governor;

g. Be an agency of communication with the Federal Government on public funds available to the State for higher education, and receive and recommend the disbursement of such funds by the State;

h. Set policy on salary and fringe benefits, and establish general personnel policies for the public institutions of higher education;

i. Coordinate with the State Board of Education and the commissioner to effectuate and advance public education at all levels;

j. Encourage harmonious and cooperative relationship between public and private institutions of higher education;

k. Review periodically existing programs of instruction, research, and public service in the public institutions of higher education, and advise them of desirable change;

l. Keep the Governor, the Legislature, and the public informed of the needs and accomplishments, both qualitative and quantitative, of public higher education in New Jersey through published reports, releases, conferences, and other means;

m. License institutions of higher education pursuant to the authority of sections 18A:68-3 to 18A:68-5 inclusive;

n. Approve the basis or conditions for conferring degrees pursuant to the authority of sections 18A:68-6 to 18A:68-8 inclusive;

o. Exercise enforcement powers as provided by sections 18A:68-9 to 18A:68-11 inclusive;

p. Require from institutions of higher education such reports as may be necessary to enable the board to perform the duties imposed upon it by statute;

q. Make to the Governor and the Legislature such recommendations as the board deems necessary with regard to appropriations that may be required for services, lands, buildings, and equipment

to be furnished by institutions of higher education other than the State University of New Jersey and make contracts in behalf of the State with such institutions in accordance with legislative appropriations; provided, that no disbursement of moneys so appropriated shall be made to any such institution or institutions utilized by the State for the purpose of public higher education, except on recommendation of the board; and the board shall see to the application of the money for such purposes;

r. Exercise visitorial general powers of supervision and control over such institutions of higher education as may be utilized by the State. Its visitorial general powers of supervision and control are hereby defined as visiting such institutions of higher education to examine into their manner of conducting their affairs and to enforce an observance of the laws of the State;

s. Fix and determine tuition rates and other fees to be paid by students at the State colleges except fees for room and board which will be established by the board of trustees of each respective State college within guidelines established by the Board of Higher Education.

18A:3-15. General rule-making power

The board of higher education shall adopt bylaws and may make and enforce, alter and repeal rules for its own government and for implementing and carrying out this law.

18A:68-3. Filing copy of certificate of incorporation and obtaining license

No corporation shall furnish instruction or learning in the arts, sciences, or professions for the purposes of admitting any person to the grade of a degree, or shall

confer or participate in conferring a degree, giving to any person a diploma of graduation or of proficiency in a course of study, in learning, or in scientific arts or methods, within this state, until it shall have filed a certified copy of its certificate of incorporation with the board of higher education and obtained from such board a license to carry on the business under such rules as the board of higher education may prescribe.

18A:68-5. Restraint of corporations operating without license

When it shall appear that any corporation is carrying on the business of such instruction or teaching, or conferring any such degree, or giving any such diploma without such license, the board of higher education, represented by the attorney general, may institute a civil action in the superior court to restrain the corporation from the transacation of any such business or the exercise of any such franchise within this state until it shall have obtained such license or the approval of said board. The court may proceed in the action in a summary manner or otherwise. The costs in any such action, to be fixed by the court shall be paid by the corporation before the dissolution of any injunctive order or judgment.

18A:68-6. Submission and approval as prerequisite to conferring of degrees

No school, corporation, association or institution of learning conducted within this state, nor any officer or member thereof, in recognition of the attainment or proficiency of any person in pursuing or graduating from any course or courses of study, arts, or learning conducted by it or another such school corporation, association or institution, shall admit any such person to the grade of a degree by conferring, or participating in conferring, any degree upon any person without first submitting the basis or conditions thereof to the board of

higher education, and obtaining its approval thereof, and of the practice of conferring and bestowing such degrees.

Nothing contained in this section shall apply to any school, corporation, association or institution of learning, or officer or member thereof, which was established and conducted within this state on April 1, 1887, and was then in the course of admitting persons to the grade of a degree by conferring the same upon them in recognition of their attainments or proficiencies, nor to any school conducted under the public school system.

18A:68-9. Penalties; recovery

An officer or member of a school, corporation, association or institution of learning who by vote or in any other manner or capacity, or a school, corporation, association or institution of learning which shall admit or participate in admitting a scholar, student, or subscriber to any grade of a degree by conferring or participating in conferring any degree upon him, contrary to the provisions of this chapter, or who shall sign any certificate or diploma as evidence of the conferring of such degree shall be liable to a penalty of not more than $300.00 for each offense, to be enforced and collected by and in the name of the board of higher education in a summary proceeding in accordance with chapter 58 of Title 2A of the New Jersey Statutes, the penalty enforcement law. Process shall be either in the nature of a summons or warrant.

18A:68-10. Failure to pay penalty

Upon the failure of the defendant to pay forthwith the amount of any money judgment rendered against him the defendant shall be committed to the county jail for a period not exceeding 90 days.